Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK GIBSON,

Petitioner,

v.

DAVID FARCAS, Warden, and
CHARLES CRIST, Attorney General of Florida,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner's Sixth Amendment right to the effective assistance of counsel was violated when his appointed trial counsel was reassigned on the eve of Petitioner's capital sexual battery trial and Petitioner's newly appointed counsel elicited inherently prejudicial evidence regarding similar uncharged acts of sexual abuse against the same victim.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court for the Middle District of Florida appears at Appendix B and is unpublished.

The opinion of the Florida Second District Court of Appeal on postconviction appeal appears at Appendix C and is reported at 835 So. 2d 1159 (Fla. 2d DCA 2003). The opinion of the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, on postconviction motion appears at Appendix D and is unpublished. The opinion of the Florida Second District Court of Appeal on direct appeal appears at Appendix E and is reported at 721 So. 2d 363 (Fla. 2d DCA 1998).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion March 7, 2005. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

28 U.S.C. Section 2254(d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Mark Gibson was convicted of capital sexual battery and condemned to spend the rest of his life in prison after a one-day trial. At that trial, Mr. Gibson was defended by a public defender whose first words to the judge when the case was called for trial were that he had just been

assigned to the case and was not prepared for trial. App. F1.[1] In the trial that followed, Mr. Gibson's counsel demonstrated his lack of preparedness. He elicited testimony from the alleged victim regarding multiple *uncharged* acts of sexual abuse similar to the acts Mr. Gibson had been charged with. App. G5. After trial, members of the jury informed the trial court the case had been a "very difficult" one with "a lot of jumbled testimony." App. H1-2. They further told the trial court that they would not have voted to convict had they known Mr. Gibson faced a mandatory life sentence. App. H2.

A. Background

Mr. Gibson was charged with capital sexual battery and lewd and lascivious conduct based on the allegation he sexually abused his eight-year-old stepdaughter. The allegations were reportedly made when Mr. Gibson's wife, Lisa Gibson, watched a television program with her daughter about a girl who had been sexually abused. T55-56, 112. According to Mrs. Gibson, she asked her daughter whether Mr. Gibson had ever "touched" her. T112. Her daughter allegedly responded that he had. T112.

At the time Mrs. Gibson raised the issue of sexual abuse with her daughter, she and Mr. Gibson had been having marital problems. T131. The Gibsons had a troubled marriage and had separated several times. T116-18. Mr. Gibson's stepdaughter had heard her mother and Mr. Gibson fighting and had also heard her mother saying on a

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[1] The Appendix will be cited as "App. ___." The trial transcript will be cited as "T___." The transcript of the postconviction evidentiary hearing will be cited as "EH___."

number of occasions that she wanted to leave Mr. Gibson. T73-75. At trial in this case, Mrs. Gibson admitted that as a teenager, she had falsely accused her own stepfather of sexually abusing her. T120.

After the allegations in this case were reported, Mrs. Gibson encouraged her husband to cooperate with the authorities. T133. She told him that if he did so, the couple could still reconcile and the family might be able to get back together. T133.

Mr. Gibson thereafter agreed to give a statement to the investigating officer. T139. Initially, Mr. Gibson denied that anything had occurred other than his stepdaughter grabbing his penis on one occasion while he was in the shower with her. T149-51, 157. The officer then told Mr. Gibson that if he was "not totally truthful," he would "end up probably going to court." T158. When Mr. Gibson stated that he "thought it was going to court anyway," the officer told him that he might end up "dealing with the State or dealing with the lawyer" if he admitted what his stepdaughter was claiming. T158. Mr. Gibson continued to specifically deny ever placing his penis between the girl's legs or near her vagina until a point at which the investigating officer stopped tape recording the interview. T159-63. Immediately after the interview resumed, Mr. Gibson admitted to having placed his penis between his stepdaughter's legs and having touched the lips of her vaginal area with his penis. T163.

The accuser was examined by a nurse practitioner experienced in child sex abuse cases. T82-83. The accuser had alleged, among other things, that Mr. Gibson had penetrated her and that she experienced pain. T52-53. The nurse practitioner determined, however, that her hymen

was intact and there was no evidence of trauma or injuries to her genitalia. T86. According to the nurse practitioner, the examination neither confirmed nor negated the allegations of sexual abuse. T88. The examination did show, however, that there was no medical evidence to support the allegation of penetration. T90-93.

Mr. Gibson was arrested on January 24, 1997, and charged with capital sexual battery and lewd and lascivious conduct.

B. The Motion for Continuance

Mr. Gibson's case was set for trial the morning of Monday, June 9, 1997. When the case was called, Mr. Gibson's public defender, Kenneth Littman, asked for a continuance. App. F1. The scheduled trial date was only four and a half months after Mr. Gibson's arrest and there had been no previous continuances. Mr. Littman told the trial court a continuance was necessary because "I was appointed to the case on Friday and I never met Mr. Gibson before this morning." App. F1. In the exchange that followed, Mr. Littman told the trial court that he had been newly assigned to take over the position of the attorney who had been handling the case, Mary Lou Cuellar. He stated that his predecessor, Ms. Cuellar, was not prepared to try the case either:

THE COURT: Now why is it you just got this case on Friday?

MR. LITTMAN: Because I was assigned to take over Ms. Cuellar's position in [the Sex Offender Division], Your Honor.

THE COURT: Where is she?

MR. LITTMAN: She has my old position of [lead trial attorney] of Division F.

THE COURT: So she's not ready to try the case?

MR. LITTMAN: No, she's not, Your Honor.

THE COURT: Why not?

MR. LITTMAN: As I said, because she's assuming her new duties before Judge Tharpe.

THE COURT: Well, I don't care a thing about her new duties. Other than the Public Defender's arbitrary reassignment of this case, why isn't it ready for trial?

MR. LITTMAN: As I said, Judge, I just took the case Friday. I never met Mr. Gibson until he walked into the court.

THE COURT: Other than the Public Defender's arbitrary reassignment of this case, why is it not ready for trial?

MR. LITTMAN: Judge, I cannot answer your question.

THE COURT: Well, stand by. Stand by to pick a jury.

App. F2-3.

C. The Trial

The entire trial, other than the jury charge and jury deliberations, took place the day after the jury was selected. Mr. Littman was lead counsel. He was joined at trial by Ms. Cuellar, the previously assigned public

defender Mr. Littman had explained was unprepared to try the case. Ms. Cuellar was "surprised" to be asked to assist with Mr. Gibson's trial and had not expected to act as co-counsel at trial. EH138.

1. The State's Case at Trial

The State offered no physical evidence to support the allegations of abuse. The State called only five witnesses: the accuser; her mother, Mrs. Gibson; the nurse practitioner who examined the accuser; the deputy sheriff who had interviewed the accuser; and the deputy sheriff who interviewed Mr. Gibson. Mrs. Gibson admitted that she had never seen Mr. Gibson touch her daughter inappropriately. T128-29. The nurse practitioner testified the accuser's hymen was intact and there was no medical evidence of penetration. T90. The deputy who interviewed the accuser testified only that when she interviewed the girl, the deputy did not suggest what she was supposed to say. T96. Mr. Gibson's taped statement was introduced through the deputy who interviewed him. T145-67.

2. Mr. Littman's Cross Examination of the Accuser

Mr. Littman cross examined the acccuser. In doing so, he elicited new testimony as to other uncharged acts of sexual abuse by Mr. Gibson on his stepdaughter. He also elicited testimony that the girl had told her mother of the abuse years before.

On direct examination, the prosecutor asked the accuser only about the acts Mr. Gibson was charged with in this case, all of which allegedly occurred within Hillsborough County, in Plant City. T45-59. In response to Mr.

Littman's cross examination, the accuser testified that Mr. Gibson had sexually abused her not only while the family lived in Plant City but also while they lived in other parts of the state:

Q.: . . . Now, the things that you told us about where he touched you, where did these things occur?

A.: What's that mean?

Q.: At what location? At what place?

A.: Probably when he lived in Lakeland. When we lived in DeLand.

Q.: Lakeland and in DeLand?

A.: And Plant City.

App. G5-6.

Mr. Gibson was not charged with oral union and the prosecution had put on no evidence that there was ever oral-vaginal contact between Mr. Gibson and his step-daughter. Mr. Littman nevertheless elicited such testimony on cross examination, then highlighted it with repeated questions:

Q.: . . . Did he do anything else to you; by that I mean, touch you in any way at someplace other than the bed?

A.: Well, he – he licked my vagina.

Q.: With his mouth?

A.: Yes, sir.

Q.: With his tongue, you mean?

A.: Yes, sir.

App. G9.

Mr. Littman did not ask that any of the above statements be stricken as unresponsive. Nor did he ever ask that the jury be instructed to disregard the accuser's testimony as to the uncharged acts. He never requested a limiting instruction prohibiting the jury's use of the uncharged acts as evidence that Mr. Gibson committed the crimes with which he was charged.

Mr. Littman also elicited on cross examination the accuser's testimony that the conversation with her mother that led to the charges in this case was not the girl's first report of abuse to her mother:

Q.: . . . [W]as there a time before you were in the nail place . . . when you told your mom that [Mr. Gibson], you say, had done something and your mom didn't believe you?

A.: Oh, I just remembered. This was a long time ago. I guess I was four or five and he had done that to me and I told my mother, but she didn't believe me because I was so young.

Q.: Are you sure you weren't a little older, six or seven, when that happened?

A.: I guess, probably six or seven. Five or four, I'm not for sure.

App. G2.

3. Mr. Gibson's Testimony

Mr. Gibson testified in his defense that the only time his stepdaughter had ever touched his penis was one occasion that took place in the shower when he was washing her hair and she grabbed his penis. T190. According to Mr. Gibson, he did not ask his stepdaughter to touch his penis and pushed her hand away when she did so. T190. Mr. Gibson denied ever touching the girl's vagina with his penis. T190.

The jury also heard Mr. Gibson explain why he had given his inculpatory statement to the investigating officer. T191. He testified that his wife had told him that if he admitted the allegations to the authorities, "they would get [their] family back together." T191. Mr. Gibson also testified that when the deputy stopped tape recording his interview, the deputy stated, "You're running me around in circles, Mr. Gibson," and threatened to take him to jail. T207.

4. The Jury's Statement

Mr. Gibson was convicted of capital sexual battery on the charge of penile penetration or union and of lewd and lascivious conduct for the touching of his penis and his touching of the victim's buttocks. App. E5. He was acquitted of the charges of capital sexual battery based on digital penetration and lewd and lascivious conduct for fondling the victim's vagina. App. E5.

As the jury left the courtroom, the trial judge asked the prosecutor whether he was correct that the penalty for the capital sexual battery charge was life without possibility of parole. T293. Shortly thereafter, the jury reentered

the courtroom. App. H1. A member of the jury gave an impassioned statement on behalf of the jury. App. H1-3. He explained that the testimony had been confusing and it appeared there had been manipulation by the accuser's mother. App. H1-2. The juror also stated that the jury convicted Mr. Gibson because they believed something "inappropriate" happened. App. H1. He did not state the jury believed a capital sexual battery had taken place:

> We feel something happened. It was a very difficult case to try. It was a lot of jumbled testimony. It was tough to – it was tough to differentiate one person's testimony from another, or any one person's testimony. We do feel some inappropriate behavior occurred.
>
> We also feel that there was possible manipulation on the mother's part; however, that doesn't mean that we don't think that something didn't happen. The whole – I'm going to put this succinctly, but I want to make sure you know our point. I'll just be graphic about it.
>
> An 8-year old child should not be taking showers with adults. The mother knew what was going on and allowed it to occur. A child should not be bringing toilet paper to an adult on the toilet. The mother knew this was going on and allowed it to occur. Yeah, they started talking about maybe she's getting too old for this to happen, but it should have come way before eight years old. It should have come at five, four.
>
> We feel the mother is not necessarily to blame for a lot of – for this to happen. How do I put this? She's not a great role model and I hope you'll take that into account in sentencing.

> We feel that the defendant deserves to be punished. I heard you say something about a life sentence. He doesn't deserve a life sentence. I hope it's not a mandatory life sentence. If I would have known that, I don't think I would have voted guilty for it.
>
> If I were king, I would take this child and put it with a different family altogether and hope that she had a great life. This is not to disparage you or your son or Mrs. Gibson. It's just a very sad situation, and we're all very concerned for the welfare of this child.
>
> No. 1, I don't know if there's anything you can do about that or not.
>
> And No. 2, for the punishment of the defendant, we feel he needs some punishment. We don't think it should be drastic or severe. If there's any way you can order counseling and anger counseling for him, we would recommend that. And if there's anything you can do in regards to psychological counseling for the mother, we would highly recommend that, as well. And, of course, the child is going to need some help.
>
> Does anybody have anything else they may want to add, or did I sum it up pretty well?

App. H1-3. The record reflects that the other jurors "indicat[ed] affirmatively." App. H3.

The trial court informed the jurors that they had heard correctly that the mandatory sentence for the capital sexual battery charge was life in prison without the possibility of parole. App. H3. The juror who had spoken previously stated, "That's an unfair sentence in this case, if you don't mind my saying so. That's a very

unfair sentence in this case." App. H3. He asked, "Do I speak for all of us when I say that?" App. H3. The record reflects that the other jurors again "indicat[ed] affirmatively," and the trial court stated, "Each of the jurors is acknowledging that's correct, he speaks for all of them." App. H4.

D. State Postconviction Proceedings

Mr. Gibson's conviction was affirmed on direct appeal. App. E. With regard to the trial court's denial of a continuance, the state appeals court said that the "decision to reassign his case to another attorney, especially when the decision was made on the Friday before his trial for a capital felony, *may raise an issue of ineffective assistance of counsel*, but it did not compel the trial judge, who was uninvolved in the reassignment, to grant a continuance." App. E8 (emphasis added)

Mr. Gibson timely filed a motion for postconviction relief in the state trial court raising, among other issues, his trial counsel's lack of preparation for trial due to his assignment to the case only shortly before trial and his trial counsel's elicitation of uncharged acts of sexual abuse. App. D3. By the time an evidentiary hearing was held on the motion for postconviction relief, three years had passed since the trial. The judge who presided at the trial was not involved in the hearing.

At the evidentiary hearing, Mr. Gibson and his mother both testified that, consistent with Mr. Littman's statement the day of trial, App. F1, Mr. Gibson had never met Mr. Littman before that day. EH102-03, 108, 218, 221, 230. Three years after the fact, Mr. Littman changed his story. He stated that his recollection was that he had been

involved in Mr. Gibson's case sooner than the Friday before trial, contrary to his representation to the trial court at the time. EH8-9. Mr. Littman stated he could not recall precisely when he had first learned of Mr. Gibson's June 9 trial, but thought it was in late May. EH29-30.

Mr. Littman claimed that he elicited the accuser's testimony regarding the uncharged acts "intentionally" because in her deposition she claimed most of the acts of sexual abuse had occurred in other counties. EH20. According to Mr. Littman, he elicited the uncharged acts to provide a basis to argue for a judgment of acquittal on the ground that the State had failed to establish venue in Hillsborough County. EH20. He also stated that he intended to argue that the victim was not worthy of belief because she was confused about where the acts had taken place. EH20-21.

Given that the accuser had already testified on direct that a capital sexual battery occurred in Hillsborough County, T54, Mr. Littman offered no explanation as to how his elicitation of other uncharged acts in other counties would deprive the trial court of venue. He also admitted that Mr. Gibson's taped statement established venue in Hillsborough County. EH40.

Mr. Littman further asserted that he elicited the accuser's testimony regarding the uncharged acts in an attempt to have Mr. Gibson's taped statement excluded on the theory that the State had failed to establish that the corpus delecti occurred in Hillsborough County. EH42-43. But the trial transcript establishes that at the time Mr. Littman cross examined the accuser, she had already testified that the act Mr. Gibson admitted to in his taped statement occurred in Hillsborough County. T53. And at

trial, the defense made no attempt to exclude Mr. Gibson's taped statement under the corpus delecti rule or on any ground.

Mr. Littman stated that his questions about the accuser's prior allegation that Mr. Gibson had sexually abused her were part of a "strategy to discredit her" by showing that her mother did not believe her previous allegations. EH21. He failed to explain how eliciting evidence of prior consistent statements that implied Mr. Gibson had been abusing his stepdaughter for years would discredit rather than bolster the accuser's testimony.

The state trial court denied Mr. Gibson's motion for postconviction relief. It found that Mr. Littman had been assigned to Mr. Gibson's case "anywhere from three days to a week" before Mr. Gibson's trial. App. D1-2. The trial court held that trial counsel's elicitation of uncharged acts of sexual abuse "had a two-prong purpose": (1) preventing the State from introducing Mr. Gibson's inculpatory statements; and (2) demonstrating "the victim's confusion and lack of credibility." App. D9. The trial court held this "strategy" was "appropriate in light of the Defendant's audio taped confession." App. D10.

The Second District Court of Appeal affirmed the denial of postconviction relief in a decision with three separate opinions. App. C. The main opinion stated that the court did not need to address "[w]hether a criminal defense attorney's decision to elicit testimony of uncharged crimes, which evidence is generally regarded as inherently highly prejudicial, can ever be considered a reasonable trial strategy." App. C3. It held that Mr. Gibson had not established he was prejudiced by any error of his counsel, because the accuser testified that the charged acts of

sexual abuse occurred and Mr. Gibson admitted in his taped statement that he touched the victim's vagina with his penis. App. C3. The main opinion did not mention the evidence that the allegations in this case were precipitated by Mrs. Gibson's questions while she and Mr. Gibson were experiencing marital problems, the lack of physical evidence of penetration, or Mr. Gibson's testimony denying the crimes and explaining that his taped statement was prompted by his wife's promises to reunite if he admitted guilt.

Judge Blue of the Second District Court of Appeal wrote a dissent, stating he concluded "that the Public Defender's Office of the Thirteenth Judicial Circuit provided ineffective assistance of counsel that requires a new trial." App. C7. Judge Blue discussed the jury's statement, observing, "Whether the victim's testimony on cross examination was the 'something happened' that resulted in the guilty verdict, we will never know. What we do know is that the attorney who did the cross examination requested a continuance on the day of trial, with the representation to the trial judge that he was not prepared for trial." App. C8. The dissent continued:

> I am aware that at the evidentiary hearing on the postconviction motion, both attorneys testified that they were prepared for trial. This testimony differed significantly from the representations made to the court at the time of trial, when the continuance was requested and the court was informed that through reassignment neither attorney was prepared to represent the defendant on these most serious charges. I come to my position on this court with some experience in the courtroom as an attorney and a trial judge. This background leads me to the conclusion that

> the attorney reassigned to another division, with no more responsibility for Gibson's case, did not prepare for trial. I accept the newly assigned public defender's earlier representations to the trial court that he was not prepared for trial. Although the record reflects that both attorneys appeared and tried the case, I am unable to see how doubling the number of unprepared attorneys provided effective assistance of counsel.
>
> I agree there was sufficient evidence presented by the State to sustain the convictions, and thus I recognize that the second prong of *Strickland* is more difficult to meet. I understand the majority's position, but the jury's reaction to this verdict convinces me that the evidence was not so overwhelming that we can conclude Gibson was not prejudiced by ineffective representation. If defendants are entitled to representation by the public defender because they are unable to afford an attorney, the system that supplies such representation has the duty to provide attorneys prepared for trial. I doubt that a private law firm, representing a client for adequate compensation in any case, would make the switch in attorneys executed by the public defender's office in this case. And this was not any case. This was a case in which the stakes were a mandatory life sentence without the possibility of parole.

App. C8-9.

E. Federal Postconviction Proceedings

Mr. Gibson timely filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Middle District of Florida. The district court denied the petition. App. B.

The Eleventh Circuit Court of Appeals affirmed the denial of Mr. Gibson's habeas petition. App. A. The Court of Appeals held that "the state court's finding that counsel was not constitutionally deficient ... was neither contrary to nor an unreasonable application of clearly established federal law." App. A5. It stated that "counsel's decision to elicit testimony from the victim regarding noncharged sex acts likely did not change the outcome of the proceedings, because Gibson confessed to the police that he committed the charged acts and this taped confession was published to the jury." App. A4. The opinion recited that trial counsel testified "that their decision to ask the victim the complained of questions was a reasonable strategic decision to discredit her testimony." App. A4-5. The Court of Appeals noted as well that "counsel sought to establish a venue challenge through these questions." App. A5, n. 3.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari should be granted. The decision below conflicts with this Court's opinions in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and the Sixth Circuit's opinion in *White v. McAnnich*, 235 F.3d 988 (6th Cir. 2000). It conflicts with this Court's decisions because it affirms the holding that Mr. Gibson received effective assistance of counsel when trial counsel's conduct was demonstrably deficient and prejudicial to Mr. Gibson. It also conflicts with *White's* holding, under facts virtually identical to the facts of this case, that a trial attorney's elicitation of testimony regarding uncharged acts of sexual abuse is ineffective assistance of counsel.

235 F.3d at 989-98. Moreover, the question presented is of great importance because it implicates the right of an indigent defendant to be represented at trial by an adequately prepared attorney.

I. The Eleventh Circuit's Decision Conflicts With *Strickland v. Washington*, *Roe v. Flores-Ortega*, and *White v. McAnnich*.

The Eleventh Circuit's holding that the state court's denial of postconviction relief was "neither contrary to nor an unreasonable application of clearly established federal law," App. A5, conflicts with this Court's opinions in *Strickland* and *Roe* and the Sixth Circuit's decision in *White*. The Court of Appeals excused trial counsel's elicitation of testimony regarding similar uncharged acts of sexual abuse against the same victim as "a reasonable strategic decision." App. A5. Trial counsel's conduct was patently unreasonable and prejudicial to Mr. Gibson.

Under *Strickland*, a defendant establishes ineffective assistance of counsel by showing that: (1) "counsel's performance was deficient" in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment"; and (2) "the deficient performance prejudiced the defense" because "counsel's errors were so serious as to deprive the defendant of a fair trial." 466 U.S. at 687. *Roe* holds that the performance inquiry requires consideration of the reasonableness of trial counsel's decisions. 528 U.S. at 481. Application of *Strickland* and *Roe* in this case requires a holding that Mr. Gibson received ineffective assistance of counsel and is entitled to a new trial.

A. Trial counsel's elicitation of uncharged acts of sexual abuse was deficient performance.

Trial counsel informed the trial judge he was unprepared for trial as a result of what the trial court called the Office of the Public Defender's "arbitrary reassignment" of Mr. Gibson's case. App. F2. Trial counsel had no choice but to proceed with trial despite his admitted lack of preparation. When he did so, he elicited damaging and prejudicial evidence from the accuser that Mr. Gibson had committed not only the acts charged, but also other similar uncharged acts. App. G7. Trial counsel compounded the problem by bringing out the accuser's testimony that she had complained of the abuse to her mother on a previous occasion, App. G3, which suggested the abuse had been taking place for years.

The state appeals court specifically declined to address whether defense counsel's decision to elicit testimony as to uncharged crimes "could ever be considered a reasonable trial strategy." Instead it held only that Mr. Gibson was not prejudiced by any of his counsel's errors. App. C3. The Court of Appeals, however, held trial counsel's actions were not deficient based on trial counsel's testimony the they were the result of "a reasonable strategic decision" intended to discredit the victim's testimony and establish a venue challenge. App. A5.

Mr. Gibson's counsel told the trial court on the day set for trial that neither he nor his predecessor was prepared to try the case. App. F2. The law is well established that a decision that results from trial counsel's lack of preparedness will not be treated as a strategic decision requiring deference from the reviewing court. *See, e.g., Wiggins v.*

Smith, 539 U.S. 510, 527-28 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

Regardless of whether trial counsel's conduct was the result of his lack of preparation or a decision that can be labeled "strategic," in any event, his performance was deficient because his actions were not reasonable. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. In this regard, *Roe* held that "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." 528 U.S. at 481. The court in *Fisher v. Gibson*, 282 F.3d 1283, 1296 (11th Cir. 2002), held that trial counsel's elicitation of testimony detrimental to his client could not be excused as trial strategy where the attorney's conduct was "unreasonable and deficient," stating that "the mere incantation 'strategy' does not insulate attorney behavior from review." (Quoting *Brecheen v. Reynolds*, 41 F.3d 1343, 1369 (10th Cir. 1994)).

In this case, trial counsel's decision to elicit damaging and prejudicial testimony regarding other uncharged acts was objectively unreasonable. Under facts that are indistinguishable in all material respects, the Sixth Circuit held in *White* that trial counsel's performance was constitutionally deficient. As here, *White* involved charges that the defendant sexually abused his stepdaughter. *Id.* at 989. Like this case, trial counsel in *White* met with the defendant in that case only briefly, if at all, prior to trial and apparently spent little time preparing for trial. *Id.* at 990-91. On cross examination, trial counsel asked the victim, as well as her mother, about an uncharged act of sexual intercourse between the victim and the defendant. *Id.* at 992-94. As in this case, defense counsel in *White*

failed to seek a limiting instruction regarding the evidence of the uncharged act. *Id.* at 994. Defense counsel claimed he elicited testimony regarding the uncharged sex act "to convince the jury that the victim had lied about the incident" because she had not reported the incident to her mother until weeks after it happened. *Id.* at 994. Defense counsel in *White* gave the same excuse for his actions that trial counsel have here: that attacking the victim's credibility was the only strategy available to him because the defendant had confessed. *Id.* at 995.

In words that apply with equal force to this case, the Sixth Circuit held in *White* that even if trial counsel's trial tactic was the result of a deliberate strategic decision, it fell "well below an objective standard of reasonableness." 235 F.3d at 997. Citing *Strickland*, the court recited the rule that "strategic decisions made after incomplete investigations receive less" deference and observed that trial counsel's "deficient pretrial preparation" rendered his claimed strategy "highly suspect." *Id.* at 996, 997. The court explained that evidence of uncharged acts is "generally inadmissible" and "rarely does a defendant present evidence of a prior crime in support of his own defense." *Id.* at 998. The court stated that the evidence of uncharged acts of sexual abuse against the same victim "was especially damaging because it tended strongly to corroborate the indictment's allegation of a sexual relationship between [the defendant] and his stepdaughter." *Id.*

Further, the *White* court stated, there was "simply no explanation for [trial counsel's] failure to request a limiting instruction on how the jury was permitted to use the evidence of the" uncharged act. 235 F.3d at 997. The court held that "[a]fter allowing the jury to hear testimony at great length about the incident, it was incompetent for

[trial counsel] not to ask the judge to remind the jury that the act was not direct evidence of the crime charged in the indictment." *Id.*

The Sixth Circuit's decision in *White* conflicts with the Eleventh Circuit's opinion in this case on the same important matter: whether trial counsel's elicitation of evidence regarding uncharged similar acts of sex abuse against the same victim is constitutionally deficient performance. As the Sixth Circuit recognized, where the decision to elicit such information results from inadequate preparation, and is not even accompanied by a request for a limiting instruction, such a "strategy" is unreasonable.

In this case, the benefit to be gained in this case from trial counsel's elicitation of uncharged sex acts, if any, was dwarfed by the potential harm from such testimony. Trial counsel gave three justifications for eliciting evidence of uncharged sex acts: (1) challenging venue; (2) seeking to suppress the taped statement under the corpus delecti rule; and (3) attempting to discredit the victim. EH20-21, 42-43. These justifications are nonexistent. At the time trial counsel cross examined the accuser, she had already testified that the alleged act that was discussed in the taped statement occurred in Hillsborough County. Trial counsel's claimed venue and corpus delecti "strategies" were hindsight rationalizations, or, at the very most, executed in haste due to time constraints, without consideration of consequences to the client. Introducing testimony that Mr. Gibson sexually abused his stepdaughter not only in Hillsborough County, but also in two other locations, could not possibly cast doubt on the stepdaughter's claims.

By contrast, the harm from the testimony defense counsel elicited was overwhelming. As the state appeals court observed, the type of evidence defense counsel introduced in this case is "inherently highly prejudicial." App. C3; *cf. United States v. Columbo*, 909 F.2d 711, 714 (2d Cir. 1990) ("Evidence linking a defendant to a rape he is not charged with has always been considered extremely prejudicial."). Making matters worse, the jury heard further testimony, also elicited by defense counsel, that the accuser had previously complained of the abuse to her mother. The only conclusion the jury could logically draw was that Mr. Gibson had been sexually abusing his step-daughter for years and the acts he was charged with were only the tip of the iceberg.

Defense counsel did nothing to mitigate the prejudice from his introduction of this devastating testimony. He failed to seek a limiting instruction informing the jury that the evidence of uncharged crimes should not be considered in deciding whether Mr. Gibson was guilty of the crimes charged. As the *White* court held, such a failure is "incompetent." 235 F.3d at 997. "There are times when even the most adroit advocate cannot extricate a criminal defendant from a pit; but when counsel, to no apparent end, digs the hole deeper, the Sixth Amendment performance standard is likely implicated." *Scarpa v. DuBois*, 38 F.3d 1, 11 (1st Cir. 1994).

The deficiencies in this case cannot fairly be characterized as "strategic." Even if they could, trial counsel's decisions were patently unreasonable and constitute deficient performance.

B. Mr. Gibson was prejudiced by trial counsel's deficient performance.

Mr. Gibson was severely prejudiced by his counsel's errors. This was, as the dissenting state appellate judge implied, an extremely close case. The accusations in this case had no support in physical or medical evidence. They were prompted by questions posed by Mr. Gibson's wife at a time when the two were experiencing serious marital problems – problems the accuser was aware of. Mr. Gibson testified and denied the allegations. He also explained that his inculpatory statement was made in response to his wife's promises that they could reunite if he admitted the allegations.

Under strikingly similar circumstances, the *White* court held that the defendant in that case was prejudiced by trial counsel's introduction of evidence regarding an uncharged sex act between the defendant and the victim. 235 F.3d at 999. Like Mr. Gibson, the *White* defendant had made an inculpatory statement. *Id.* In both cases, there was evidence tending to undermine the reliability of the confession and the victim's testimony regarding the charged sex acts was "largely uncorroborated." *Id.* The *White* court stated:

> In a case such as this, where so little evidence was adduced in support of the charges in the indictment, [trial counsel] needed to be doubly careful to ensure that prejudicial evidence did not improperly persuade the jury to convict [the defendant]. However, . . . the jury had reason to believe that it could consider the uncharged incident in determining [the defendant's] guilt.

Id.

The facts here are even more compelling than *White's* because the record here offers a rare insight into the jurors' view of this case. The jurors believed this was a "difficult case" and that the testimony they heard was "jumbled." App. H1-2. They felt the accuser had been manipulated by her mother and while "some inappropriate behavior" had occurred, App. H2, their post-trial comments did not indicate they believed what had occurred was a capital sexual battery. As Judge Blue stated in his dissent in the state appeals court, "Whether the victim's testimony on cross examination was the 'something happened' that resulted in the guilty verdict, we will never know." App. C8. But the jury's reaction is convincing support for the proposition "that the evidence was not so overwhelming that we can conclude Gibson was not prejudiced by ineffective representation." App. C9.

II. The Question Presented Is of Great Importance Because It Implicates the Rights of Indigent Defendants to the Assistance of Counsel Prepared for Their Defense.

The question presented by this case is of great public importance because it implicates the rights of indigent defendants to be represented at trial by counsel who are adequately prepared to defend them. Under the Sixth Amendment to the United States Constitution, indigent defendants share the same right to the assistance of counsel as defendants who can afford to hire an attorney. *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963). This Court has recognized that fairness and justice require representation of indigent defendants:

> From the very beginning, our state and national constitutions and laws have laid great emphasis

> on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.

Id. at 344. If the "poor man" is to have a meaningful right to representation by counsel, he cannot be required to go to trial defended by unprepared, constitutionally deficient counsel merely because the public defender's office chose to arbitrarily reassign his case to another attorney.

Judge Blue recognized the unfairness inherent in forcing Mr. Gibson to go to trial represented by counsel who was not prepared:

> If defendants are entitled to representation by the public defender because they are unable to afford an attorney, the system that supplies such representation has the duty to provide attorneys prepared for trial. I doubt that a private law firm, representing a client for adequate compensation in any case, would make the switch in attorneys executed by the public defender's office in this case. And this was not any case. This was a case in which the stakes were a mandatory life sentence without the possibility of parole.

App. C9.

Moreover, even if the last-minute reassignment had not deprived Mr. Gibson's trial counsel of adequate time to prepare for trial, it affected Mr. Gibson's ability to participate in his own defense. Mr. Gibson testified that he met his lead trial attorney immediately before that attorney told the court he was not prepared and moved for a continuance. EH213, 230. His counsel never discussed with

him the decision to cross examine the accuser regarding other uncharged acts of sexual abuse. EH98, 219-20, 229-30. While no person is entitled to a perfect trial, it is safe to say that defendants who can afford to pay a lawyer to represent them on charges that can result in life imprisonment do not meet their lawyer for the first time the day of trial, or even a week earlier.

The trial court's decision that Mr. Gibson should have to go to trial represented by a man who informed the court he had met his client only that day and that neither he nor his predecessor was prepared to try the case elevated the interest of processing cases over the rights of the criminally accused. The affirmance of Mr. Gibson's conviction on direct appeal was premised on the assumption that the "decision to reassign his case to another attorney, especially when the decision was made on the Friday before his trial for a capital felony, may raise an issue of ineffective assistance of counsel, but it did not compel the trial judge, who was uninvolved in the reassignment, to grant a continuance." App. E8. Mr. Gibson's counsel was unprepared for trial due to the last-minute reassignment. He demonstrated his lack of preparedness by taking actions that harmed his client. Yet Mr. Gibson has been afforded no relief by any state or federal court.

Certiorari should be granted in this case. The Court should hold clearly and definitively that all defendants, indigent as well as wealthy, are entitled at least to be defended by an attorney who has had the opportunity to prepare for trial. That is the only result that will ensure that every defendant truly "stands equal before the law." *Gideon*, 372 U.S. at 344.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: June 6, 2005

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-12390
Non-Argument Calendar

D. C. Docket No. 03-01863-CV-T-24-MAP

MARK GIBSON,

Petitioner-Appellant,

versus

DAVID FARCAS, Warden,
ATTORNEY GENERAL OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(Filed March 7, 2005)

Before HULL, WILSON and HILL, Circuit Judges.

PER CURIAM:

Mark Gibson, a Florida prisoner, was convicted of one count of capital sexual battery and two counts of lewd and lascivious conduct. He is serving a life sentence. He filed a

petition, pursuant to 28 U.S.C. § 2254, in the district court, alleging ineffective assistance of counsel.[1] The district court denied his petition and we granted his motion for a certificate of appealability on the issues of whether he received ineffective assistance of counsel. A district court's denial of a § 2254 petition is reviewed *de novo. Sims v. Singletary,* 155 F.3d 1297, 1304 (11th Cir. 1998).

In his brief on appeal, Gibson argues that the district court should have found *per se* ineffective assistance of counsel as the result of the public defender's office last minute change in his counsel of record. *See United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 674 (1984).[2] Gibson, however, failed to raise this issue in the district court. He did not argue anywhere in his habeas petition or in his brief in support of his petition that the state appellate court failed accurately to apply the *per se* prejudice doctrine established in *Cronic* to his claim that the last minute reassignment of his counsel deprived him of the effective assistance of counsel during pretrial proceedings. Gibson did not claim *per se* prejudice nor mention *Cronic* in the district court. Because he failed to raise this claim in the district court, we will not address for the first time in his appeal his contention that the state court failed accurately to apply the per se prejudice doctrine

---

[1] Because Gibson filed his § 2254 petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L No. 104-132, 110 Stat. 1214 (1996), the provisions of that act govern his appeal.

[2] In *Cronic,* 466 U.S. at 659-62, 104 S.Ct. at 2047-48, the Supreme Court indicated that per se ineffective assistance of counsel could be found where, inter alia, there has been a "complete denial of counsel" at "a critical stage" of the proceedings.

established in *Cronic* to his claim that the last-minute reassignment of his counsel deprived him of the assistance of counsel. *Hurley v. Moore,* 233 F.3d 1295, 1297 (11th Cir. 2000) (per curiam).

Gibson next argues that his counsel's cross-examination of the victim, which led to the revelation of uncharged instances of sexual touching between Gibson and the victim, constituted ineffective assistance of counsel. He contends that this line of questioning was not formulated pursuant to an informed evaluation of the defense's strategic options. Gibson argues that, but for this line of questioning, there is a reasonable probability that he would not have been convicted because (1) his taped statement was not a confession, but a partial admission regarding certain acts, and (2) the jury's statement to the court regarding its verdict indicated that the jury was influenced by the victim's allegations of previous sexual abuse.

Under § 2254(d)(1), a petitioner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court, unless the decision of the state court was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). The Supreme Court has held that, under § 2254(d)(1), a state court decision is "contrary to" clearly established federal law if a state court (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S.Ct. 1495, 1519-20, 146 L. Ed.2d 389 (2000). A state court decision amounts to a contrary or an unreasonable application of

federal law if the state court (1) "identifies the correct governing rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407, 120 S.Ct. at 1520.

To establish a case of ineffective assistance of counsel where counsel's performance was not ineffective *per se,* a petitioner must show that (1) his counsel's performance was deficient, and (2) his defense was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L. Ed.2d 674 (1984). There is a strong presumption that counsel's performance falls "within the wide range of reasonable professional assistance." *Id* at 689, 104 S.Ct. at 2065. A strategic trial decision will be considered deficient only if it was so patently unreasonable that no competent counsel would have made the same decision. *Adams v. Wainwright,* 709 F.2d 1443, 1445 (11th Cir. 1983). To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

In this case, counsel's decision to elicit testimony from the victim regarding noncharged sexual acts likely did not change the outcome of the proceedings, because Gibson confessed to the police that he committed the charged acts and this taped confession was published to the jury. Furthermore, counsel testified during the evidentiary hearing on the ineffective assistance claim in state court that their decision to ask the victim the complained of

questions was a reasonable strategic decision to discredit her testimony.[3] Accordingly, the district court correctly held that the state court's finding that counsel was not constitutionally deficient in this regard was neither contrary to nor an unreasonable application of clearly established federal law.

Upon review of the record on appeal and upon consideration of the parties' briefs, we discern no reversible error. Accordingly, we affirm the district court's denial of Gibson's § 2254 petition.

AFFIRMED.

[3] Additionally, counsel sought to establish a venue challenge through these questions.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MARK GIBSON,

Petitioner,

-vs- Case No. 8:03-cv-1863-T-24MAP

WARDEN DAVID FARCAS,

Respondent.

ORDER

(Filed Mar. 29, 2004)

This cause is before the Court on Petitioner Mark Gibson (Gibson's) petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Attorney Christopher J. Dale. Gibson challenges his conviction and sentence entered by the Circuit Court for the Thirteenth Judicial Circuit, Hillsborough County, Florida.

PROCEDURAL HISTORY

The original information in this case charged Gibson with three counts of capital sexual battery based on penile penetration or union, digital penetration, and oral union. The information included a fourth count of lewd and lascivious conduct based on Gibson's request to have the child victim touch his penis. The victim was Gibson's then eight-year-old stepdaughter.

On the Friday before the trial in June 1997, the State amended the information to allege two counts of capital sexual battery, dropping the charge of oral union. The

amended information included three counts of lewd and lascivious conduct, adding charges based on improper contact with the victim's buttocks and fondling the victim's vagina.

The jury convicted Gibson of capital sexual battery on the charge of penile penetration or union, and of lewd and lascivious conduct for the touching of his penis and for his touching the victim's buttocks. The jury acquitted him of the remaining charges.

At a subsequent hearing, the state trial court imposed the mandatory life sentence on the capital sexual battery charge, after Gibson had rejected a post-verdict proposal from the State that Gibson plead guilty "to some charge" and waive his appellate rights in exchange for a sentence of imprisonment with the possibility of release after 25 years.[1] The state trial court sentenced Gibson to 136 months imprisonment on each of the two lewd and lascivious counts with the sentences to run concurrently.

Gibson appealed. Gibson's retained attorney, Donald A. Smith, Jr., filed an initial brief raising the following four issues:

> Should the Defendant be granted a new trial due to the trial courts denial of his motion for a continuance of the trial?
>
> Should the Defendant be granted a new trial because his pretrial statement to law enforcement was admitted into evidence without a knowing and voluntary waiver of his right to counsel and against self-incrimination?

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[1] *See* Gibson v. State, 721 So. 2d 363, 366 (Fla. 2d DCA 1998).

> Should the Defendant be granted a new trial because the weight of the evidence does not support his conviction for sexual battery?
>
> Should the Defendant's sentence be reversed because the sentence of life imprisonment, without parole, is excessive, disproportionate, cruel and unjust?

(Respondent's Exhibit 1)[2]

The state district court of appeal affirmed Gibson's judgments and sentences in a written opinion. Gibson v. State, 721 So. 2d 363 (Fla. 2d DCA 1998).

On April 28, 1999, Gibson, through his retained counsel, filed a Rule 3.850 motion for post-conviction relief raising three grounds: 1) ineffective assistance of trial counsel for defense counsel's failure to file a motion suppressing Gibson's confession; 2) ineffective assistance of trial counsel for defense counsel's failure to object to the introduction of inadmissible evidence; 3) ineffective assistance of counsel for decision of the Public Defender's office to arbitrarily reassign Defendant's trial counsel to another division.

On February 1, 2000, the state trial court summarily denied grounds one and two and ordered the State to respond to ground three, in an order that read, in pertinent part:

> In ground one, Defendant alleges ineffective assistance of counsel for defense counsel's failure

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[2] Respondent filed the three-volume record on direct appeal in Case No. 2D97-3477 as Exhibit 22.

to file a motion suppressing Defendant's confession. Defendant alleges that upon his arrival at the interview, the interrogating detective read Defendant his *Miranda* rights, then referred to them as "a lot of legal garbage" and that the detective understated the charges and their severity during the questioning of Defendant. Defendant claims that if he had known that he faced a life sentence he would not have confessed.

Although Defendant was read his *Miranda* rights, *Miranda* is only applicable when a suspect is interrogated while in police custody. See Miranda v. Arizona, 384 U.S. 436, 66 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In determining whether an individual is in custody, a court must consider whether there was a formal arrest or restraint on freedom of movement of the degree associated with a form [sic] arrest. *See* Stansbury v. California, 511 U.S. 318, 322-323, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293, 298 (1994). Defendant voluntarily came to the police station to be interviewed regarding the allegations by the child victim. The interview was held in a standard interview room and Defendant was informed that he was merely being interviewed, not arrested, for allegations of sexual contact with his stepdaughter. (See Transcript, Vol. III, pp. 138-148). Thus, at the time of his interview by police, Defendant was not in custody, so as to require *Miranda* warnings. Rather, Defendant voluntarily gave certain statements constituting an admission. Such a series of events does not call for suppression of the statements. *See* State v. Gilles, 701 So.2d 375 (3d DCA 1997).

Assuming arguendo that the *Miranda* warnings given were necessary in this case, suppression of the post-*Miranda* confession would not be proper unless the confession was made involuntarily or unknowingly. *See Miranda* v. Arizona, 394 U.S. 436, 444 (1966). To determine whether Defendant waived his right against self incrimination, the questions are "whether the waiver was a free choice on the part of the defendant and not the product of intimidation, coercion, or deception . . . [and] whether the waiver was made with a full awareness of the nature of the right being abandoned and the consequences of its abandonment." State v. Manning, 506 So.2d 1094, 1096 (Fla. 3d DCA 1987) *citing* Moran v. Burbine, 475 U.S. 412 (1986). These determinations are made by weighing the totality of the circumstances. *See id.*

Though the detective was not specific regarding the possible penalties applicable to defendant, police deception does not automatically invalidate a confession, especially where there is no doubt that the defendant was read and understood his *Miranda* rights. *See* State v. Cayward, 552 So.2d at 973 *citing* Halliwell v. State, 323 So.2d 557 (Fla. 1975). Although Defendant was not informed he was the suspect of a capital sexual battery punishable by life imprisonment, Defendant by his own admission knew that he was suspected of having sexual contact with his stepdaughter. The fact that the detective did not tell Defendant that the crimes suspected were capital offenses and that Defendant thought the investigation was about misdemeanor crimes are not grounds for relief. Delusion or confusion in a suspect's own mind, which is the result of the suspect's own mental state, apprehension, or lack

of factual knowledge will not render a confession inadmissable. *See* Thomas v. State, 456 So.2d 454, 458 (Fla. 1984).

There is nothing in the record to suggest that Defendant was forced to confess by physical coercion, threats or promises of leniency, improper interrogation techniques, or severe emotional distress inflicted by the police. Rather, Defendant spoke freely to the detective throughout the interview after having been informed of his *Miranda* rights. (*See* Transcript Vol. III, pp. 144-167). As such, Defendant's confession was freely, voluntarily, and knowingly given to the police.

Therefore, the statements made to police were not subject to suppression nor inadmissable, as they were made after Defendant was read his *Miranda* warnings and he waived the applicable rights. A failure to file a motion to suppress is not ineffective assistance of counsel where the motion to suppress would not, even if filed, properly have been granted because the defendant suffers no prejudice. *See* Gettel v. State, 449 So. 2d 413, 414 (Fla. 2d DCA 1984). Because there were no grounds upon which the trial court could suppress the confession, there was no prejudice to Defendant as a result of counsel's failure to file such a motion. Therefore, the Court finds that as to ground one, Defendant has failed to meet the second prong of the Strickland test.

In Ground two, Defendant alleges ineffective assistance of counsel for defense counsel's failure to object to the introduction of inadmissible evidence to wit: defendants pretrial statements made to Detective Craig. in any claim based on counsel's failure to object at trial, the defendant

> must show that counsel "had no excuse for overlooking the objection" and that the outcome of the trial "likely" would have been different had the objection been made. *See* Rhue v. State, 603 So. 2d 613 (Fla. 2d DCA 1992). Defendant fails to show how counsel had no excuse for overlooking the objection or how the outcome of the trial "likely" would have been different had the objection been made. As it has been determined that Defendant's statements made to police were admissible, there were no grounds upon which counsel could have objected. It is not ineffective assistance of counsel for failure to object to a meritless claim. *See* Byrd v. Singletary, 655 So. 2d 67, 67 (Fla. 1995). As such, no relief is warranted on ground two.

(Respondent's Exhibit 8)

The State filed a response on February 22, 2000, asserting that an evidentiary hearing was required to resolve ground three. (Respondent's Exhibit 9)

The Honorable Rex Martin Barbas, Circuit Judge, conducted the post-conviction evidentiary hearing on June 8 and 9, 2000. The state trial court heard testimony from Gibson's two trial attorneys, Mary Lou Cuellar and J. Kenneth Littman. In addition, the state trial court heard testimony from Gibson; from Gibson's mother, Sarah Hall; and from Michael Sinacore, the Assistant State Attorney who represented the State at Gibson's trial.

During her testimony, Attorney Cuellar summarized the defense strategy:

> MS. CUELLAR: The trial strategy was that the – that Mr. Gibson was making the statement to law enforcement based on the fact

that his wife had told him at the time "will you go and talk to the police and maybe we can get back together," and that's how he explained the fact that he talked to the police.

There were some definite problems with his defense. And in his tape, his defense was that he did admit to taking a shower with the child; however, that he never penetrated the child, that the child, on her own, initiated grabbing his penis and that none of the other things took place.

One of the things that was a defense in the case, because his position was that this child was making up a lot of this and that the mother had put her up to it, was to bring out the issues between the mother and him and to bring out the fact that the mother had falsely accused the father, her father, before the [sic] to bring out the child's inconsistencies as far as where this took place and when it took place.

Q. When did you learn of these inconsistencies that the child would testify to?

A. The first time I found out about the consistencies [sic] was with the deposition of Mary Mower (phonetic) – She's the H.R.S. – well, now it's called Children and Families, but she was the worker from the department.

Q. When did you take her deposition?

A. Her deposition was taken on May 14th of '97.

Q. And was Ms. Mower familiar with the investigation surrounding this family?

A. Yes. She was the Department of Children and Family worker. She – the report was

initiated – somehow the Abuse Hot Line was called by somebody and, of course, Mary Mower was the child protective investigator who responded to interview the child. So – and in her deposition, she talked about her interview with the child and the fact that the child had some confusion about where this took place.

Q. Okay. Now, when you did the deposition of the child on June 3rd, did the child express confusion about where these things took place?

A. I believe she did. I believe that she indicated that it happened somewhere else because what brought on – the fact that they had lived in several different locations in different counties, I think there were three different counties involved, but in her deposition, she indicated that she was six years old when this initially happened. And I think at the time of the trial, she was somewhat older than that. And she indicated that this happened when she lived in Deland, and that what she was talking about all happened in Deland.

(Respondent's Exhibit 10, EH 144-146)[3]

Attorney Cuellar further testified that she was aware that Attorney Littman was going to cross-examine the victim about where the sexual acts occurred, that both attorneys had discussed the matter beforehand, and that Gibson was aware that Attorney Littman would be asking those questions. (EH 147) Attorney Cuellar stated that in

[3] Respondent filed the transcript of the evidentiary hearing in two parts: Exhibit 10, and Exhibit 10 Vol. II. Citations to the transcript will be designated by the letters "EH" followed by the page number(s) which are in sequence.

her opinion it was not harmful to Gibson for Attorney Littman to ask the victim specifically about other acts that occurred in other locations, because one of the weaknesses in the State's case was that the victim had a problem remembering exactly where the acts took place, and the victim had specifically mentioned Deland as the location. (EH 151-152)

As to defense counsels' failure to move to suppress Gibson's confession, Attorney Cuellar testified that the defense considered a motion to suppress, but there was no good faith basis for challenging the voluntariness of the confession. (EH 159-160, 163). Attorney Cuellar explained that Gibson had told his attorneys that the reason he went to the police and made the statement was the fact that Gibson's wife told him that if he made the statement, there might be a chance for Gibson and his wife to get back together. (EH 159) According to Attorney Cuellar, Gibson's explanation for making the statement did not provide a legal basis to suppress the statement based on law enforcement's in any way coercing him or threatening him. (EH 160)

Attorney Littman testified regarding his cross-examination of the victim. He stated that as part of the defense strategy, he intentionally asked the victim questions regarding the location at which specific sex acts occurred. (EH 20) He explained that at her deposition the preceding week, the victim had indicated "most of the various sex acts that Mr. Gibson had committed had occurred either in Lakeland, which would be Polk County, or Deland, which if I'm not mistaken, is Volusia County. In fact, she was emphatic that most of the things occurred in those other counties, which would deprive this court of jurisdiction and improper venue and there could be no

prosecution" (EH 20) Attorney Littman testified that "those questions were meant for follow-up on that to see if possibly we could either get a basis for a J.O.A., saying that the State had failed to establish venue properly in Hillsborough County, or that the child was either making up a story or totally confused as to be not worthy of belief." (EH 20) Attorney Littman was aware that the victim had made an allegation that Gibson had committed oral sex on her when the family lived in Deland, an allegation that came out during the victim's deposition. (EH 20) Consequently, Attorney Littman was not surprised when the victim testified about oral sex. (EH 20) Attorney Littman testified that this testimony did not bother him because "part of our strategy was to discredit her and we brought out on cross that she had made these allegations of prior sex acts committed by Mr. Gibson to her mother and that her Mother did not believe her." (EH 21) Part of the defense strategy was to show that the victim's own mother did not believe these allegations. (EH 21) Attorney Littman tested that he argued at length during closing argument at trial that there was reasonable doubt based on the child's failure to state with certainty and specificity where the acts occurred. (EH 21) Attorney Littman also indicated that he believed the jury acquitted Gibson on two of five counts because the victim had waffled on those issues.

As to the defense attorneys' preparedness to go to trial, the evidence adduced at the hearing established that both Attorney Cuellar and Attorney Littman were familiar with the state's evidence and Gibson's theory of defense. (EH 9) Prior to trial, the attorneys conducted discovery, including reviewing police reports and taking depositions of all state witnesses. (EH 11, 132) Both attorneys were present at the depositions of the most

significant witnesses: the victim, the victim's mother, and the nurse examiner. Both trial attorneys reviewed the police reports, depositions, and all the information contained in the Public Defender's Office file prior to trial. (EH 16, 17, 131, 137, 138, 150). Both attorneys were veteran criminal defense attorneys; were qualified to try sexual battery cases; and had extensive experience trying similar cases. (EH 6-8, 120-121, 153) Both attorneys testified that they were very familiar with the facts of the case, had discussed the defense strategy, and were comfortable in their preparation for trial. (EH 12, 132, 144, 146-147)

On June 21, 2000, the state trial court judge announced his ruling in open court:

> The other issue that comes up, and it gave me much more greater concern, was the fact of the defense counsel bringing up through the testimony of the child alleged other criminal acts. That did give me a lot of concern, and that's one of the reasons why I went back and read her testimony. I wanted to see how the testimony went from both the direct portion during the State's portion of direct examination and during cross-examination by defense counsel. And it's rather evident that during direct testimony she was very succinct, very clear in her testimony. There was no confusion about what she was saying. There was no doubt – if I – if the case stopped at that point, no question in my own mind he would have been found guilty of every single count.
>
> The only confusion that arose and which the foreperson could have attributed the confusion to was on cross-examination of the child. That's the only place confusion could have arisen because it

couldn't have arisen from the testimony of the mother, it could not have arisen from the testimony of the detective who testified regarding the confession, the only place confusion could have arisen was from the cross examination. That's rather evident that the child was hesitant in regards to certain responses she was giving. So if there was confusion, it came as a result of the cross-examination of the child and I think that's rather evident from review of the testimony of the child and from the foreperson's comments at the conclusion of the trial. Because if they were confused about what happened it came as a result of defense counsel's cross examination.

That being so, I don't think the defense can show by preponderance of the evidence that the – and I think that's what the standard is, that the result would have been different had they taken a different tact, just the opposite. I think the result would have been more severe if they did not take the tact that they did.

. . . .

And I don't see – And the primary burden on you, sir, is that whether he is – whether counsel were competent or incompetent during the trial. It's as if their actions if they would have taken a different action the result would have been different, and frankly I don't think the result would have been different in this case after I read the transcript. I think just the opposite. I think yeah it would have been different, he would have been found guilty of more counts because the only confusion I saw in the whole trial was in cross-examination of the child. And that cross-examination was confusing as a result of questioning of defense counsel of the child regarding

> other instances, that's the only confusion. Because if you rely strictly on direct examination of the child and confession of the defendant and then the cross examination of the child, the defendant would have been found – I have no doubt in my mind the defendant would have been found guilty of every single count. Consequently, I'm going to deny your motion.

(Respondent's Exhibit 11, R 240-242, 246-247)[4]

On November 28, 2000, Judge Barbas filed an Order Denying Defendant's Motion for Post Conviction Relief:

> Appellant's motion established the following unrebutted facts:
>
> The Defendant was represented by Assistant Public Defenders Mary Lou Cuellar and Kenneth Littman at Defendant's trial on one count of Sexual Battery (Victim Less Than 12) and four counts of Lewd and Lascivious Act (On Child). The trial commenced on June 9, 1997. Mr. Littman had been assigned to the case anywhere from three days to a week earlier. Mr. Littman assumed the role of lead trial attorney for the trial.
>
> The Defendant had made a post-*Miranda* audiotaped statement to police admitting he had committed a sexual battery and various other sexual misconduct upon the child victim in Hillsborough County. Mr. Littman testified that the defense strategy was to keep this taped confession out of evidence. In the alternative, the defense strategy was to minimize the Defendant's

[4] The pages in Respondent's Exhibit 11 are Bates stamped.

confession by demonstrating that the victim was confused about the alleged incidents and therefore lacked credibility.

On cross-examination of the child victim, Mr. Littman asked questions attempting to establish that she was uncertain where the alleged events took place. The victim testified to prior alleged and uncharged sexual misconduct allegedly committed by the Defendant. Mr. Littman testified that by cross-examining the child victim regarding the location where each act had occurred, there was a possibility that the State would not be able to establish the corpus delecti [sic] required to admit into evidence the Defendant's taped confession. However, the child victim did testify that at least one alleged sexual battery did occur in Plant City, Hillsborough County. The State introduced the Defendant's taped confession into evidence without defense objection.

Mr. Littman testified that the other defense strategy, discrediting the child victim, was also to be accomplished through cross-examination of the child victim concerning prior alleged and uncharged bad acts by the Defendant. Mr. Littman testified that the purpose of this line of questioning was to demonstrate the child victim's confusion and, thus, lack of credibility.

The jury returned a guilty verdict on one count of Sexual Battery (Victim Less Than 12) and two counts of Lewd and Lascivious Act (On Child) and a not-guilty verdict on two counts of Lewd and Lascivious Act (On Child).

DEFENDANT'S ARGUMENT

The crux of the Defendant's Motion is that Assistant Public Defenders Kenneth Littman and Mary Lou Cuellar were unprepared to mount an adequate defense. The Defendant contends that this lack of preparation resulted in an unsound trial strategy and, but for this unsound trial strategy, there is a reasonable probability that the outcome of the proceeding would have been different. Specifically, Defendant posits that Mr. Littman imprudently or inadvertently elicited from the child victim other alleged and uncharged offenses against the Defendant that detrimentally affected the Defendant's defense. Defendant maintains that this elicitation of other alleged and uncharged offenses and his attorney's alleged lack of preparation amount to ineffective assistance of counsel.

I. Preparation for Trial

Defendant's underlying premise is that his trial attorneys were unprepared to mount an adequate defense. This premise hinges on two main propositions. First, Defendant maintains that the Public Defender's Office arbitrarily reassigned Defendant's lead trial counsel shortly before trial. Mr. Littman assumed responsibility for the case, at best, only a week before the trial. Defendant asserts that Mr. Littman thus had an inadequate amount of time to evaluate the strengths and weaknesses of a capital sexual battery defense. Second, the Defendant points to Mr. Littman's comments to Judge Allen the morning of the trial. The record of that morning (June 9, 1997) reflects that Mr. Littman informed Judge Allen that he was not prepared to go forward with the trial (Mr. Littman does dispute the

accuracy of the record and the accuracy of the statements attributed to him). The Defendant maintains that Mr. Littman's statements to Judge Allen correctly reflect Mr. Littman's belief that he was unprepared for trial. Defendant contends that these two incidents demonstrate that his trial attorneys were not prepared for trial and, thus, he was deprived of his constitutional right to adequate assistance of counsel.

The benchmark for evaluating an ineffective assistance of counsel claim was enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The Strickland Court held that a defendant claiming ineffectiveness must demonstrate trial counsel's performance was deficient and the defendant was deprived of a fair trial because of counsel's deficient performance. *See id.* at 687. The measure of ineffectiveness is a demonstration that counsel's performance fell below an "objective standard of reasonableness." *Id.* at 688.

In a case decided the same day, the Court determined that the circumstances surrounding a defendant's representation do not demonstrate a showing of ineffective assistance absent a showing of actual ineffectiveness. *See* United States v. Cronic, 466 U.S. 648, 663, 104 S.Ct. 2039, 2049 (1984). In *Cronic,* the defendant's counsel had been appointed only 25 days before. His appointed counsel was young and principally practiced in the area of real estate law. *See id.* Conversely, the Government had prepared for the trial for four and a half years and had reviewed thousands of documents during its investigation. *See id.* The Court held that these factors might shed light on his lawyer's performance but it did not justify a presumption of ineffectiveness. *See*

id. at 665. The defendant must point to specific errors made by counsel to sustain an infectivenss (sic) claim – not external factors that do not point to unreasonable and ineffective representation. *See id.* at 666; *see also* Avery v. Alabama, 308 U.S. 444, 450-453, 60 S.Ct. 321, 324-325 (1940) (holding that where defense counsel had been appointed only three days prior to capital trial, and witnesses and evidence were easily accessible to counsel, it was not unreasonable to expect counsel to be adequately prepared for trial).

In the instant case the Defendant asserts that Mr. Littman had inadequate time to prepare for a capital felony trial. The unrebutted testimony of Ms. Cuellar, however, demonstrated that Mr. Littman's co-counsel had diligently worked on Defendant's case for at least three months. Ms. Cuellar further testified that Mr. Littman participated in a number of depositions and they conferred about trial strategy on a number of occasions. The testimony and the record do not demonstrate a lack of preparedness by the Defendant's attorneys. Nevertheless, even if Defendant's assertion that his attorneys were unprepared is correct, it still does not demonstrate ineffectiveness. The mere fact that Mr. Littman might have been appointed three days before trial is analogous to the factual situation in *Cronic.* Indeed, in the instant case the Defendant enjoyed the services of two experienced felony trial attorneys – much more experienced than the defendant's attorney in *Cronic.* Regardless, the assignment of new counsel shortly before trial cannot validate Defendant's ineffectiveness claim absent an actual demonstration of ineffectiveness. *See Cronic,* 466 U.S. at 665.

Similarly, Mr. Littman's representations to Judge Allen on the morning of Defendant's trial, concerning his preparedness, do not justify a claim of ineffectiveness. The fact that Mr. Littman represented to the Court he was unprepared, or even his belief that he was unprepared, fail to demonstrate ineffectiveness absent an actual showing that Mr. Littman's professional performance fell below an "objective level of reasonableness." Strickland, 466 U.S. at 688. While Mr. Littman's assignment to the case shortly before trial and his statements to Judge Allen the morning of trial may shed light upon his performance, they do not themselves demonstrate ineffectiveness. *See Cronic,* 466 U.S. at 664.

II. Trial Strategy

The Defendant next argues that the defense strategy was so fundamentally flawed that there is a reasonable probability that the outcome of the proceeding would be different if this strategy had not been implemented. Specifically, Mr. Littman's cross-examination of the child victim elicited other uncharged sexual misconduct allegedly committed by the Defendant. The Defendant maintains that the introduction by the defense of these other uncharged bad acts was highly prejudicial and a jury could reasonably be expected to form the improper propensity inference. The Defendant emphasizes that if the uncharged offenses had not been elicited by defense counsel it would not have been admissible at trial. *See* § 90.404 (2) (a), Florida Statutes; *see also,* Williams v. State, 110 So.2d 654 (Fla. 1959). Indeed, the introduction of these prior bad acts at trial is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as

evidence of the guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981). The Defendant asserts that the uncharged offenses elicited from the victim were so inflammatory that Defendant was unfairly prejudiced to his considerable detriment.

In addition, the Defendant posits that even if the Court determines that the defense strategy was sound, Mr. Littman failed to execute it effectively. Specifically, after the child victim testified that the Defendant had inappropriately "touched" her in Hillsborough County, Mr. Littman did not introduce her prior inconsistent deposition testimony to impeach her. This failure to impeach the victim, according to Defendant, further solidified the jury's belief that the Defendant had committed various acts of sexual misconduct in many different places for a number of years. Defendant asserts that Mr. Littman's failure to effectively execute this prong of the defense strategy also constitutes a ground for ineffective assistance of counsel.

The reasonableness of trial counsel's conduct is evaluated within the parameters delineated by the United States Supreme Court in Strickland. The Court noted:

> Judicial scrutiny of counsel's performance must be highly deferential . . . [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. [Therefore], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689. The burden is on the defendant to overcome the presumption that trial counsel's conduct falls within the wide range of reasonable professional conduct. *See id.* An investigation of the reasonableness of trial counsel's professional conduct must be an individualized inquiry confined to the facts of each particular case. *See id.* at 690.

The Florida Supreme Court applied the dictates of Strickland in *Brown v. State,* 25 Fla. L. Weekly S193 (Fla. March 9, 2000). The defendant in Brown had made a post-*Miranda* confession that was successfully offered into evidence by the prosecution. *See id.* Brown's attorney made the strategic decision to argue to the jury that the defendant was guilty of the lesser offense of second-degree murder. *See id.* Brown argued that his lawyer's performance fell below the reasonable assistance standard articulated in Strickland because his trial counsel's concession of defendant's guilt was anathema to competent advocacy. *See id.* The *Brown* Court rejected Brown's argument noting that a lawyer's strategic decisions made pursuant to a thorough examination of the relevant law and facts are nearly unchallengeable. *See id.* at S196 (citing Strickland, 466 U.S. at 690).

In the instant case, the Defendant alleges that the elicitation from the victim of various uncharged offenses overcomes the presumption of effective assistance of counsel. The inflammatory nature of the victim's allegations were so prejudicial that it rendered the result of the trial unreliable. *See* Strickland, 466 U.S. at 688. Defendant correctly states that there is no indication that the prosecution could have introduced this evidence under the *Williams* Rule. Defendant's argument,

however, falters when he asserts that because the defense introduced this evidence at trial it necessarily proves ineffective assistance of counsel. The individualized inquiry of every ineffectiveness claim mandated by Strickland, however, requires an examination of the circumstances surrounding this strategic decision at the time of the decision. *See id.*; *see also Brown,* 25 Fla. L. Weekly at S196.

The cornerstone of the defense strategy was to prevent the prosecution from introducing the Defendant's inculpatory statements. Mr. Littman testified that the defense hoped to accomplish this through a cross-examination of the victim that demonstrated the victim did not remember where the events took place. If this strategy failed and the confession was introduced into evidence, the defense hoped to demonstrate the victim's confusion and lack of credibility. Thus, the elicitation of prior alleged bad acts committed by the Defendant had a two-prong purpose. Defendant's attorneys weighed the risk of eliciting these alleged bad acts with the potential reward of creating enough doubt and confusion to negate or minimize the Defendant's own confession. This strategic decision does not constitute a departure from reasonable and competent assistance. Like the defense attorney in *Brown,* the Defendant's attorneys weighed their options and made an informed decision in light of relevant facts and law. *See Brown,* 25 Fla. L. Weekly at S193.

Defendant's assertion that the Defendant's bad acts would not be proper *Williams* Rule evidence misses the point. The decision by Mr. Littman and Ms. Cuellar to introduce testimony of Defendant's prior bad acts was appropriate in

light of the circumstances surrounding the case – particularly Defendant's audiotaped confession. It is irrelevant that the same evidence would be improper if introduced by the prosecution. Indeed, Defendant supports his claim with cases where the introduction of prior bad acts was improperly introduced by the prosecution – not where the introduction of this evidence was introduced by the defense pursuant to a strategic decision. *See Straight,* 397 So.2d at 908; *Williams,* 110 So.2d at 654.

Defendant also points to Mr. Littman's failure to properly impeach the victim concerning her prior deposition testimony. Assuming without deciding that this lapse is error, Defendant fails to demonstrate a reasonable probability that the outcome of the trial would have been different if Mr. Littman had impeached the victim. *See* Strickland, 466 U.S. at 695. Indeed, the vacillating and wavering testimony of the victim at trial created sufficient confusion about the veracity of the described acts and the reliability of the victim's testimony. Mr. Littman elicited from the victim a number of times that she wasn't sure which events transpired and where these events occurred. The Defendant fails to demonstrate that had Mr. Littman introduced the victim's prior inconsistent statement the trial result would have been different.

III. Conclusion

Defendant has failed to demonstrate that his trial attorneys' performance fell below the reasonably effective assistance of counsel standard articulated in Strickland. *See id.* at 687. The trial strategy implemented by his attorneys was a high wire act balancing the risks that a jury

> might make the propensity inference with the reward that confusion and reasonable doubt might exonerate the Defendant. The circumstances of this particular case, however, demonstrate that the strategy and its implementation were appropriate in light of the Defendant's audiotaped confession. *See Brown,* 25 Fla. L. Weekly at S196. The mandate of Strickland requires this Court to evaluate trial counsel's performance in a highly deferential manner recognizing the distorting effects of hindsight. *See* Strickland, 466 U.S. at 689. Within this evaluative framework, the Defendant's constitutional right to effective assistance of counsel was not compromised.

(Respondent's Exhibit 012)

Gibson, through his retained counsel, Donald A. Smith, Jr., appealed the adverse ruling. On November 15, 2002, in Case No. 2D01-497, the state district court of appeal issued a written opinion affirming the state trial court's denial of post-conviction relief. Gibson v. State, 835 So. 2d 1159 (Fla. 2d DCA 2002).

The state district court of appeal also denied Gibson's Motion for Rehearing and Motion for Rehearing En Banc. (Respondent's Exhibits 16 and 17). Gibson, through retained attorney Christopher J. Dale, then timely filed the present federal petition for writ of habeas corpus, raising three claims of ineffective assistance of counsel.

STANDARD OF REVIEW

Gibson's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and specifically 28 U.S.C. § 2254(d) as amended. *See Williams v.*

Taylor, 529 U.S. 420 (2000) (where petitioner filed his federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the statute applied to his case). Section 2254 (d) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. The highly deferential standard in 28 U.S.C. § 2254(d), as amended, provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

See Putman v. Head, 268 F.3d 1223 (11th Cir. 2001), for an explanation of Section 2254(d)(1).

Furthermore, Section 2254(e)(1) provides for a highly deferential standard of review for factual determinations made by a state court. A state court's factual findings are presumed correct, unless rebutted by the petitioner with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Title 28 U.S.C. Section 2254(e)(2) sets out the provisions under which an evidentiary hearing are necessary.

In Wright v. Secretary for Dep't of Corrections, 278 F. 3d 1245, 1255 (11th Cir. 2002), *cert. denied,* Wright v. Crosby, 123 S. Ct. 1511 (2003), the court held that for a state court's resolution of a claim to be an adjudication on the merits, so that the state court's determination will be entitled to deference for purposes of federal habeas corpus review under AEDPA, all that is required is a rejection of the claim on the merits, not an opinion that explains the state court's rationale for such a ruling.

Finally, the state court's failure to cite the relevant Supreme Court precedents in rejecting a petitioner's federal claim does not mean that the state court did not apply the correct rule of governing federal law such that AEDPA deference does not apply to federal habeas review. Early v. Packer, 537 U.S. 3, 8 (2002); Parker v. Sec'y for the Dep't of Corrections, 331 F.3d 764, 776 (11th Cir. 2003).

DISCUSSION

A review of the record demonstrates that, for the following reasons, Gibson is not entitled to federal habeas corpus relief on any of his ineffective assistance of counsel claims.

In Strickland v. Washington, 466 U.S. 558 (1984), the Supreme Court established a two-part test for determining whether a convicted person is entitled to habeas relief on the ground that his or her counsel rendered ineffective assistance: (1) whether counsel's representation was deficient, i.e., "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defendant, i.e., there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

at 687-88; *see also* Wiggins v. Smith, 123 S.Ct. 2527 (2003); Williams v. Taylor, 529 U.S. 362 (2000). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690). This judicial scrutiny is "highly deferential." *Id.* at 477. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689-90; Bell v. Cone, 535 U.S. at 698. Because the ultimate resolution of the ineffective assistance of counsel claims are mixed questions of law and fact, Thompson v. Haley, 255 F.3d 1292, 1297 (11th Cir. 2001); Meeks v. Moore, 216 F.3d 951, 959 (11th Cir. 2000), the presumption of correctness contained in § 2254(e)(1) does not apply to this determination. *Parker v. Head,* 244 F.3d at 835-837.

Ground One

Gibson claims his original trial counsel, Attorney Cuellar, was ineffective for failing to file a motion to suppress his confession. Gibson contends his confession was involuntary due to the law enforcement officers' failure to advise him that they were investigating a capital offense. The trial court summarily denied this claim, finding that *Miranda* warnings were not required because Gibson was not in custody at the time he gave his statement. However, the *Miranda* warnings *were* given; Gibson made a knowing, voluntary waiver of those rights; and his confession did not result from any type of police coercion or misconduct.

Ground Two

Gibson asserts Attorney Cuellar was ineffective by failing to object to the introduction of inadmissible evidence, namely, Gibson's statements to Detective Craig. Again, the state trial court summarily denied this claim, properly finding that the claim was facially insufficient. The state trial court held, moreover, that since the statements were admissible, counsel's failure to object at trial was not ineffective.

Ground Three

Gibson claims the arbitrary reassignment of his trial counsel by the Office of the Public Defender constituted ineffective assistance of counsel and resulted in the further deprivation of effective assistance of counsel throughout the trial. The Honorable Morris Silberman addressed this issue in his concurring opinion in the post-conviction appeal, stating:

> At the evidentiary hearing on Gibson's post-conviction motion, both the first attorney who represented him in the underlying case and the attorney who was assigned to take over the representation testified. Although Gibson asserts that his attorneys were not adequately prepared to represent him at trial, the record reflects that they were highly experienced criminal defense lawyers; they attended the depositions of the key witnesses in the case; they discussed and agreed on the strategy to be used; they met with and prepared Gibson for trial; they felt they were fully prepared to try the case; and they tried the case together. Their testimony reflects that the change in their case assignments did not hamper their ability to represent Gibson.

. . . .

> The attorneys were emphatic that Gibson had a weak defense case because of his confession and the evidence that they expected would be presented at trial. They also testified that they had taken the victim's deposition and thought they could show the victim was confused about whether the incidents occurred and where they had occurred. The attorneys stated that difficult strategy choices had to be made. They acknowledged that at trial, the cross-examination of the victim was broad and resulted in her testimony as to additional acts of sexual abuse committed by Gibson. However, they concluded that their best hope of successfully defending Gibson was to discredit the victim by asking open-ended questions that would lead her to appear confused and unbelievable. They also believed this strategy might help to explain away Gibson's confession.

Gibson v. State, 835 So.2d at 1161-62 (Silberman, Judge, specially concurring).

While the strategy used by defense counsel was unsuccessful in securing a complete acquittal for Gibson, he was found not guilty of two of the charges. But whether a strategy is successful or unsuccessful is not the standard by which counsels' performance must be measured. *See* Sireci v. State, 469 So.2d 119, 120 (Fla.1985). Rather, there is a presumption of reasonableness of counsel's trial strategy. *See Downs v. State,* 453 So.2d 1102, 1108 (Fla. 1984). Judge Barbas correctly noted that "[t]he trial strategy implemented by [Gibson's] attorneys was a high wire act balancing the risks that a jury might make the propensity inference with the reward that confusion and

reasonable doubt might exonerate [Gibson]. The circumstances of this particular case, however, demonstrate that the strategy and its implementation were appropriate in light of [Gibson's] audiotaped confession."

Judicial scrutiny of counsels' performance must be highly deferential, and there is a strong presumption that counsels' conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. at 689. Moreover, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

Gibson's burden was to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The ineffective assistance of counsel must have "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

The record supports the state trial court's denial of relief. Gibson's attorneys evaluated the case, weighed the options, and made an informed decision as to what they considered to be the best available strategy to defend Gibson in a weak defense case. Because the record does not lead to the conclusion that, but for the claimed errors of counsel there was a reasonable probability that the outcome of the trial would have been different, Gibson has not met his burden to show that counsel was ineffective under the Strickland standard.

To the extent Petitioner argues that his attorneys' lack of preparedness caused them to elicit damaging testimony from the victim regarding additional sex acts, the state trial and appellate courts determined that this line of questions was part of a deliberate strategy by defense counsels which resulted in no prejudice to Gibson. *Id.*

Gibson is not entitled to federal habeas corpus relief on grounds one, two, or three.

Accordingly, the Court orders:

That Gibson's petition for writ of habeas corpus is denied, with prejudice. The Clerk is directed to enter judgment against Gibson and to close this case.

ORDERED in Tampa, Florida, on MARCH 26, 2004.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
UNITED STATES
DISTRICT JUDGE

SA/sm

APPENDIX C

835 So.2d 1159

District Court of Appeal of Florida, Second District.
Mark Lee GIBSON, Appellant,
v.
STATE of Florida, Appellee.
No. 2D01-497.

Nov. 15, 2002.
Rehearing Denied Jan. 27, 2003.

Donald A. Smith, Jr., and Gwendolyn R. Hollstrom of Smith & Tozian, P.A., Tampa, for Appellant.

Richard E. Doran, Attorney General, Tallahassee, and Michele Taylor, Assistant Attorney General, Tampa, for Appellee.

GREEN, Judge.

Mark Lee Gibson appeals an order denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. The motion alleged three grounds for relief. The trial court summarily denied the first two grounds of the motion, and we affirm that ruling without further comment. Ground three of the motion alleged ineffective assistance of counsel, and the trial court ordered an evidentiary hearing on this ground. After the hearing, the trial court denied relief. We conclude that ineffective assistance of counsel did not prejudice Mr. Gibson, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and therefore, we also affirm this portion of the order.

This court previously affirmed Mr. Gibson's direct appeal of his judgments and sentences with an extensive written opinion. *See Gibson v. State*, 721 So.2d 363 (Fla. 2d

DCA 1998). In *Gibson*, the court detailed some of the circumstances that led to the present claim for ineffective assistance of counsel.

Mr. Gibson was charged with two counts of capital sexual battery and three counts of lewd and lascivious act on a child under twelve years of age, which carried a mandatory life sentence. The week before his trial, the attorney who initially represented Mr. Gibson was reassigned to another division, and Mr. Gibson was given a new attorney. There is some dispute as to exactly when this occurred. There is also some dispute as to the new attorney's ability to adequately prepare for the trial. Indeed, the new attorney requested a continuance the morning of trial alleging he was unprepared to try the case, but the continuance was denied. Ultimately, both the initial attorney and the newly assigned attorney represented Mr. Gibson. Both attorneys were experienced criminal trial attorneys.

In his postconviction motion, Mr. Gibson alleged that the new counsel did not adequately prepare a defense and, as a result, committed a critical, prejudicial error during the trial. While cross-examining the child victim, this attorney asked the child broad, open-ended questions. The child responded by testifying to additional acts of sexual abuse by Mr. Gibson with which Mr. Gibson had not been charged. At least one of these acts would have itself constituted capital sexual battery.

At the postconviction hearing, the attorney who elicited this testimony asserted that his questioning was a specific, thought-out trial strategy intended to show the

child victim was confused in her many allegations.[1] Mr. Gibson points out that there were other, less perilous ways to accomplish that purpose, such as asking very specific, limited questions or impeaching the child with prior statements. Whether a criminal defense attorney's decision to elicit testimony of uncharged crimes, which evidence is generally regarded as inherently highly prejudicial, can ever be considered a reasonable trial strategy is not an issue we need address in this case. *See, e.g., Cabrera v. State*, 766 So.2d 1131, 1133 (Fla. 2d DCA 2000) (noting "patently unreasonable" decisions, although characterized as tactical, are not immune from ineffective assistance claims). We conclude that there was no prejudice to Mr. Gibson from any error of counsel. *See Cook v. State*, 638 So.2d 134, 136 (Fla. 1st DCA 1994) (stating that court considering claim of ineffective assistance of counsel need not make a specific ruling on performance component when it is clear that prejudice component is not satisfied).

The child victim testified resolutely and consistently that the charged acts of sexual abuse occurred. More important, Mr. Gibson admitted to those acts in a recorded confession to law enforcement, including an admission that his penis made contact, or "union," with the victim's vagina, which would support his conviction for capital sexual battery. In a postconviction proceeding, it is Mr. Gibson's burden to establish prejudice as a result of counsel's errors. We conclude, as did the postconviction trial judge, that there is no reasonable probability that the

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[1] We note that this strategy may have had some of its intended effect, as the jury ultimately found Mr. Gibson not guilty of one count of capital sexual battery and not guilty of one count of lewd and lascivious act.

outcome of the trial proceedings would have been different even in the absence of the child's testimony on cross-examination.

Affirmed.

SILBERMAN, J., Concurs specially with opinion.

BLUE, C.J., Dissents with opinion.

SILBERMAN, Judge, Specially concurring.

Although several points raised by the dissent are troubling, based on the record before us I agree with the majority opinion.

At the evidentiary hearing on Gibson's postconviction motion, both the first attorney who represented him in the underlying case and the attorney who was assigned to take over the representation testified. Although Gibson asserts that his attorneys were not adequately prepared to represent him at trial, the record reflects that they were highly experienced criminal defense lawyers; they attended the depositions of the key witnesses in the case; they discussed and agreed on the strategy to be used; they met with and prepared Gibson for trial; they felt they were fully prepared to try the case; and they tried the case together. Their testimony reflects that the change in their case assignments did not hamper their ability to represent Gibson.

The attorneys were emphatic that Gibson had a weak defense case because of his confession and the evidence that they expected would be presented at trial. They also testified that they had taken the victim's deposition and thought they could show the victim was confused about whether the incidents occurred and where they had

occurred. The attorneys stated that difficult strategy choices had to be made. They acknowledged that at trial, the cross-examination of the victim was broad and resulted in her testimony as to additional acts of sexual abuse committed by Gibson. However, they concluded that their best hope of successfully defending Gibson was to discredit the victim by asking open-ended questions that would lead her to appear confused and unbelievable. They also believed this strategy might help to explain away Gibson's confession.

While the strategy used by defense counsel was unsuccessful in securing a complete acquittal for Gibson, he was found not guilty of two of the charges. But whether a strategy is successful or unsuccessful is not the standard by which counsels' performance must be measured. *See Sireci v. State*, 469 So.2d 119, 120 (Fla.1985). Rather, there is a presumption of reasonableness of counsel's trial strategy. *See Downs v. State*, 453 So.2d 1102, 1108 (Fla.1984). While the dissent concludes that counsels' strategy was unreasonable, the postconviction trial court's conclusion to the contrary is supported by the record. Judge Barbas correctly noted that "[t]he trial strategy implemented by [Gibson's] attorneys was a high wire act balancing the risks that a jury might make the propensity inference with the reward that confusion and reasonable doubt might exonerate [Gibson]. The circumstances of this particular case, however, demonstrate that the strategy and its implementation were appropriate in light of [Gibson's] audiotaped confession."

The applicable standard of review requires us to defer to the trial court's factual findings that are supported by competent, substantial evidence, but we independently review the trial court's legal conclusions. *See Cabrera v.*

State, 766 So.2d 1131, 1133 (Fla. 2d DCA 2000). It is not for this court to reweigh the evidence and substitute its view of the witnesses' credibility for that of the trial court. *See Blanco v. State*, 702 So.2d 1250, 1252 (Fla.1997). Judicial scrutiny of counsels' performance must be highly deferential, and there is a strong presumption that counsels' conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Moreover, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052.

Gibson's burden was to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. The ineffective assistance of counsel must have "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. 2052.

The record before us supports the postconviction trial court's denial of relief. Gibson's attorneys evaluated the case, weighed the options, and made an informed decision as to what they considered to be the best available strategy to defend Gibson in a weak defense case. Because the record does not lead to the conclusion that, but for the claimed errors of counsel there was a reasonable probability that the outcome of the trial would have been different, I concur with the majority opinion.

BLUE, Chief Judge, Dissenting.

I respectfully dissent. I conclude that the Public Defender's Office of the Thirteenth Judicial Circuit provided ineffective assistance of counsel that requires a new trial. To fully understand my position requires familiarity with the prior decision in this case on direct appeal. *Gibson*, 721 So.2d 363.

Mark Gibson was set for trial on two counts of capital sexual battery, each carrying a mandatory life sentence, and three counts of lewd and lascivious acts. On the day of trial, an assistant public defender requested a continuance, stating that he had just met the defendant and was not prepared for trial. This newly assigned assistant public defender attributed this problem to the reassignment of attorneys in the week before trial. The trial court denied the continuance, and on direct appeal this court affirmed, ruling that it was not an abuse of discretion. *Gibson*, 721 So.2d at 366 (holding that the public defender's decision to reassign Gibson's case to another attorney, "especially when that decision was made on the Friday before his trial for a capital felony, may raise an issue of ineffective assistance of counsel, but it did not compel the trial judge, who was uninvolved in the reassignment, to grant a continuance").

Later that day, trial proceeded with the assistant public defender relieved from the case and the newly assigned public defender. During cross-examination, as part of a strategy to confuse the young victim, the newly assigned public defender "successfully" elicited testimony from the victim of uncharged capital sexual battery conduct.

The jury found Gibson guilty of one count of capital sexual battery and two counts of lewd and lascivious acts; he was found not guilty of one count of capital sexual battery and one count of lewd and lascivious acts. Before leaving the courtroom, the jury learned that Gibson was to be sentenced to life imprisonment without the possibility of parole. One of the jurors, in passionate terms and with the agreement of the other jurors, told the court that they believed something had happened, but they would not have found the defendant guilty had they known their verdict would result in the sentence to be imposed.

Whether the victim's testimony on cross-examination was the "something happened" that resulted in the guilty verdict, we will never know. What we do know is that the attorney who did the cross-examination requested a continuance on the day of trial, with the representation to the trial judge that he was not prepared for trial.

I am aware that at the evidentiary hearing on the postconviction motion, both attorneys testified that they were prepared for trial. This testimony differed significantly from the representations made to the court at the time of trial, when the continuance was requested and the court was informed that through reassignment neither attorney was prepared to represent the defendant on these most serious charges. I come to my position on this court with some experience in the courtroom as an attorney and a trial judge. This background leads me to the conclusion that the attorney reassigned to another division, with no more responsibility for Gibson's case, did not prepare for trial. I accept the newly assigned public defender's earlier representations to the trial court that he was not prepared for trial. Although the record reflects that both attorneys appeared and tried the case, I am unable to see how

doubling the number of unprepared attorneys provided effective assistance of counsel.

I agree there was sufficient evidence presented by the State to sustain the convictions, and thus I recognize that the second prong of *Strickland* is more difficult to meet. I understand the majority's position, but the jury's reaction to this verdict convinces me that the evidence was not so overwhelming that we can conclude Gibson was not prejudiced by ineffective representation. If defendants are entitled to representation by the public defender because they are unable to afford an attorney, the system that supplies such representation has the duty to provide attorneys prepared for trial. I doubt that a private law firm, representing a client for adequate compensation in any case, would make the switch in attorneys executed by the public defender's office in this case.[2] And this was not any case. This was a case in which the stakes were a mandatory life sentence without the possibility of parole. I conclude the Public Defender for the Thirteenth Judicial Circuit provided ineffective assistance of counsel to this defendant that cannot be rectified without a new trial, and thus I dissent.

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[2] One rationale for affirming the denial of a continuance on direct appeal was the conclusion that the public defender's office was the equivalent of a law firm. *Gibson,* 721 So.2d at 366 ("The public defender's office is comparable, in some respects, to a law firm. The trial court had appointed that office, not a specific assistant public defender, to represent Mr. Gibson.").

APPENDIX D

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

v.

MARK LEE GIBSON /

CASE NO. 97-1202

DIVISION: C

ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

(Filed Nov. 28, 2000)

THIS MATTER is before the Court on Defendant's Motion for Post Conviction Relief ("Motion") filed on April 28, 1999, pursuant to Florida Rule of Criminal Procedure 3.850. By prior order of the Court, entered on February 1, 2000, grounds one and two of the Defendant's motion were denied. The Court conducted an evidentiary hearing on ground three on June 8-9, 2000. In evaluating Defendant's Motion, the Court considered the court file, the record, the arguments of counsel, and the memorandums of law filed herein.

The Defendant's motion established the following unrebutted facts:

The Defendant was represented by Assistant Public Defenders Mary Lou Cuellar and Kenneth Littman at Defendant's trial on one count of Sexual Battery (Victim Less Than 12) and four counts of Lewd and Lascivious Act (On Child). The trial commenced on June 9, 1997. Mr. Littman had been assigned to the case anywhere from

three days to a week earlier. Mr. Littman assumed the role of lead trial attorney for the trial.

The Defendant had made a post-Miranda audiotaped statement to police admitting he had committed a sexual battery and various other sexual misconduct upon the child victim in Hillsborough County. Mr. Littman testified that the defense strategy was to keep this taped confession out of evidence. In the alternative, the defense strategy was to minimize the Defendant's confession by demonstrating that the victim was confused about the alleged incidents and therefore lacked credibility.

On cross-examination of the child victim, Mr. Littman asked questions attempting to establish that she was uncertain where the alleged events took place. The victim testified to prior alleged and uncharged sexual misconduct allegedly committed by the Defendant. Mr. Littman testified that by cross-examining the child victim regarding the location where each act had occurred, there was a possibility that the State would not be able to establish the corpus delecti required to admit into evidence the Defendant's taped confession. However, the child victim did testify that at least one alleged sexual battery did occur in Plant City, Hillsborough County. The State introduced the Defendant's taped confession into evidence without defense objection.

Mr. Littman testified that the other defense strategy, discrediting the child victim, was also to be accomplished through cross-examination of the child victim concerning prior alleged and uncharged bad acts by the Defendant. Mr. Littman testified that the purpose of this line of questioning was to demonstrate the child victim's confusion and, thus, lack of credibility.

The jury returned a guilty verdict on one count of Sexual Battery (Victim Less Than 12) and two counts of Lewd and Lascivious Act (On Child) and a not-guilty verdict on two counts of Lewd and Lascivious Act (On Child).

DEFENDANT'S ARGUMENT

The crux of the Defendant's Motion is that Assistant Public Defenders Kenneth Littman and Mary Lou Cuellar were unprepared to mount an adequate defense. The Defendant contends that this lack of preparation resulted in an unsound trial strategy and, but for this unsound trial strategy, there is a reasonable probability that the outcome of the proceeding would have been different. Specifically, Defendant posits that Mr. Littman imprudently or inadvertently elicited from the child victim other alleged and uncharged offenses against the Defendant that detrimentally effected the Defendant's defense. Defendant maintains that this elicitation of other alleged and uncharged offenses and his attorneys' alleged lack of preparation amount to ineffective assistance of counsel.

I. Preparation for Trial

Defendant's underlying premise is that his trial attorneys were unprepared to mount an adequate defense. This premise hinges on two main propositions. First, Defendant maintains that the Public Defender's Office "arbitrarily" reassigned Defendant's lead trial counsel shortly before trial. Mr. Littman assumed responsibility for the case, at best, only a week before the commencement of trial, or, at worst, three days before the trial. Defendant asserts that Mr. Littman thus had an

inadequate amount of time to evaluate the strengths and weaknesses of a capital sexual battery defense. Second, the Defendant points to Mr. Littman's comments to Judge Allen the morning of the trial. The record of that morning (June 9, 1997) reflects that Mr. Littman informed Judge Allen that he was not prepared to go forward with the trial (Mr. Littman does dispute the accuracy of the record and the accuracy of the statements attributed to him). The Defendant maintains that Mr. Littman's statements to Judge Allen correctly reflect Mr. Littman's belief that he was unprepared for trial. Defendant contends that these two incidents demonstrate that his trial attorneys were not prepared for trial and, thus, he was deprived of his constitutional right to adequate assistance of counsel.

The benchmark for evaluating an ineffective assistance of counsel claim was enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The *Strickland* Court held that a defendant claiming ineffectiveness must demonstrate trial counsel's performance was deficient and the defendant was deprived a fair trial because of counsel's deficient performance. *See id.* at 687. The measure of ineffectiveness is a demonstration that counsel's performance fell below an "objective standard of reasonableness." *Id.* at 688.

In a case decided the same day, the Court determined that the circumstances surrounding a defendant's representation do not demonstrate a showing of ineffective assistance absent a showing of actual ineffectiveness. *See United States v. Cronic*, 466 U.S. 648, 663, 104 S.Ct. 2039, 2049 (1984). In *Cronic*, the defendant's counsel had been appointed only 25 days before his trial on complex mail fraud charges. *See id.* at 649. The appointed counsel was

young and principally practiced in the area of real estate law. *See id.* Conversely, the Government had prepared for the trial for four and a half years and had reviewed thousands of documents during its investigation. *See id.* The Court held that these factors might shed light on his lawyer's performance but it did not justify a presumption of ineffectiveness. *See id.* at 665. The defendant must point to specific errors made by counsel to sustain an infectiveness [sic] claim – not external factors that do not point to unreasonable and ineffective representation. *See id.* at 666; *see also Avery v. Alabama*, 308 U.S. 444, 450-453, 60 S.Ct. 321, 324-325 (1940) (holding that where defense counsel had been appointed only three days prior to capital trial, and witnesses and evidence were easily accessible to counsel, it was not unreasonable to expect counsel to be adequately prepared for trial).

In the instant case, the Defendant asserts that Mr. Littman had inadequate time to prepare for a capital felony trial. The unrebutted testimony of Ms. Cuellar, however, demonstrated that Mr. Littman's co-counsel had diligently worked on Defendant's case for at least three months. Ms. Cuellar further testified that Mr. Littman participated in a number of depositions and they conferred about trial strategy on a number of occasions. The testimony and the record do not demonstrate a lack of preparedness by the Defendant's attorneys. Nevertheless, even if Defendant's assertion that his attorneys were unprepared is correct, it still does not demonstrate ineffectiveness. The mere fact that Mr. Littman might have been appointed three days before trial is analogous to the factual situation in *Cronic*. Indeed, in the instant case the Defendant enjoyed the services of *two* experienced felony trial attorneys – much more experienced than the defendant's

attorney in *Cronic*. Regardless, the assignment of new counsel shortly before trial cannot validate Defendant's ineffectiveness claim absent an actual demonstration of ineffectiveness. *See Cronic*, 466 U.S. at 665.

Similarly, Mr. Littman's representations to Judge Allen on the morning of Defendant's trial, concerning his preparedness, do not justify a claim of ineffectiveness. The fact that Mr. Littman represented to the Court he was unprepared, or even his belief that he was unprepared, fail to demonstrate ineffectiveness absent an actual showing that Mr. Littman's professional performance fell below an "objective level of reasonableness." *Strickland*, 466 U.S. at 688. While Mr. Littman's assignment to the case shortly before trial and his statements to Judge Allen the morning of trial may shed light upon his performance, they do not themselves demonstrate ineffectiveness. *See Cronic*, 466 U.S. at 665.

II. Trial Strategy

The Defendant next argues that the defense strategy was so fundamentally flawed that there is a reasonable probability that the outcome of the proceeding would be different if this strategy had not been implemented. Specifically, Mr. Littman's cross-examination of the child victim elicited other uncharged sexual misconduct allegedly committed by the Defendant. The Defendant maintains that the introduction by the defense of these other uncharged bad acts was highly prejudicial and a jury could reasonably be expected to form the improper propensity inference. The Defendant emphasizes that if the uncharged offenses had not been elicited by defense counsel it would not have been admissible at trial. *See* s.

90.404(2)(a), Florida Statutes; *see also, Williams v. State*, 110 So.2d 654 (Fla. 1959). Indeed, the introduction of these prior bad acts at trial is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of the guilt of the crime charged." *Straight v. State*, 397 So.2d 903, 908 (Fla. 1981). The Defendant asserts that the uncharged offenses elicited from the victim were so inflammatory that Defendant was unfairly prejudiced to his considerable detriment.

In addition, the Defendant posits that even if the Court determines that the defense strategy was sound, Mr. Littman failed to execute it effectively. Specifically, after the child victim testified that the Defendant had inappropriately "touched" her in Hillsborough County, Mr. Littman did not introduce her prior inconsistent deposition testimony to impeach her. This failure to impeach the victim, according to Defendant, further solidified the jury's belief that the Defendant had committed various acts of sexual misconduct in many different places for a number of years. Defendant asserts that Mr. Littman's failure to effectively execute this prong of the defense strategy also constitutes a ground for ineffective assistance of counsel.

The reasonableness of trial counsel's conduct is evaluated within the parameters delineated by the United States Supreme Court in *Strickland*. The Court noted:

> Judicial scrutiny of counsel's performance must be highly deferential . . . [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. [Therefore], a court must indulge a strong presumption that counsel's conduct falls

> within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689. The burden is on the defendant to overcome the presumption that trial counsel's conduct falls within the wide range of reasonable professional conduct. *See id.* An investigation of the reasonableness of trial counsel's professional conduct must be an individualized inquiry confined to the facts of each particular case. *See id.* at 690.

The Florida Supreme Court applied the dictates of *Strickland* in *Brown v. State*, 25 Fla. L. Weekly S193 (Fla. March 9, 2000). The defendant in *Brown* had made a post-Miranda confession that was successfully offered into evidence by the prosecution. *See id.* Brown's attorney made the strategic decision to argue to the jury that the defendant was guilty of the lesser offense of second-degree murder in the hopes of avoiding a conviction of first-degree murder. *See id.* Brown argued that his lawyer's performance fell below the reasonable assistance standard articulated in *Strickland* because his trial counsel's concession of defendant's guilt was anathema to competent advocacy. *See id.* The *Brown* Court rejected Brown's argument noting that a lawyer's strategic decisions made pursuant to a thorough examination of the relevant law and facts are nearly unchallengeable. *See id.* at S196 (*citing Strickland*, 466 U.S. at 690).

In the instant case, the Defendant alleges that the elicitation from the victim of various uncharged offenses overcomes the presumption of effective assistance of counsel. The inflammatory nature of the victim's allegations were so prejudicial that it rendered the result of the

trial unreliable. *See Strickland*, 466 U.S. at 688. Defendant correctly states that there is no indication that the prosecution could have introduced this evidence under the *Williams* Rule. Defendant's argument, however, falters when he asserts that because the defense introduced this evidence at trial it necessarily proves ineffective assistance of counsel. The individualized inquiry of every ineffectiveness claim mandated by Strickland, however, requires an examination of the circumstances surrounding this strategic decision at the time of the decision. *See id.*; *see also Brown*, 25 Fla. L. Weekly at S196.

The cornerstone of the defense strategy was to prevent the prosecution from introducing the Defendant's inculpatory statements. Mr. Littman testified that the defense hoped to accomplish this through a cross-examination of the victim that demonstrated the victim did not remember where the events took place. If this strategy failed and the confession was introduced into evidence, the defense hoped to demonstrate the victim's confusion and lack of credibility. Thus, the elicitation of prior alleged bad acts committed by the Defendant had a two-prong purpose. Defendant's attorneys weighed the risk of eliciting these alleged bad acts with the potential reward of creating enough doubt and confusion to negate or minimize the Defendant's own confession. This strategic decision does not constitute a departure from reasonable and competent assistance. Like the defense attorney in *Brown*, the Defendant's attorneys weighed their options and made an informed decision in light of relevant facts and law. *See Brown*, 25 Fla. L. Weekly at S193

Defendant's assertion that the Defendant's bad acts would not be proper *Williams* Rule evidence misses the point. The decision by Mr. Littman and Ms. Cuellar to

introduce testimony of Defendant's prior bad acts was appropriate in light of the circumstances surrounding the case – particularly Defendant's audiotaped confession. It is irrelevant that the same evidence would be improper if introduced by the prosecution. Indeed, Defendant supports his claim with cases where the introduction of prior bad acts was improperly introduced by the prosecution – not where the introduction of this evidence was introduced by the defense pursuant to a strategic decision. *See Straight*, 397 So.2d at 908; *Williams*, 110 So.2d at 654.

Defendant also points to Mr. Littman's failure to properly impeach the victim concerning her prior deposition testimony. Assuming without deciding that this lapse is error, Defendant fails to demonstrate a reasonable probability that the outcome of the trial would have been different if Mr. Littman had impeached the victim. *See Strickland*, 466 U.S. at 695. Indeed, the vacillating and wavering testimony of the victim at trial created sufficient confusion about the veracity of the described acts and the reliability of the victim's testimony. Mr. Littman elicited from the victim a number of times that she wasn't sure which events transpired and where these events occurred. The Defendant fails to demonstrate that had Mr. Littman introduced the victim's prior inconsistent statement the trial result would have been different.

III. Conclusion

Defendant has failed to demonstrate that his trial attorneys performance fell below the reasonably effective assistance of counsel standard articulated in *Strickland. See id.* at 687. The trial strategy implemented by his attorneys was a high wire act balancing the risks that a

jury might make the propensity inference with the reward that confusion and reasonable doubt might exonerate the Defendant. The circumstances of this particular case, however, demonstrate that the strategy and its implementation were appropriate in light of the Defendant's audio taped confession. *See Brown*, 25 Fla. L. Weekly at S196. The mandate of *Strickland* requires this Court to evaluate trial counsel's performance in a highly deferential manner recognizing the distorting effects of hindsight. *See Strickland*, 466 U.S. at 689. Within this evaluative framework, the Defendant's constitutional right to effective assistance of counsel was not compromised. It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion for Post Conviction Relief is **DENIED**.

ORDERED at Tampa, Hillborough [sic] County, Florida this 17 day of ~~July~~ Nov. 2000.

/s/ Rex Barbas
Rex Martin Barbas
Circuit Judge

Copies furnished to:

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MICHAEL C. SINACORE
Office of the State Attorney

APPENDIX E

721 So.2d 363

District Court of Appeal of Florida,Second District.
Mark L. GIBSON, Appellant,
v.
STATE of Florida, Appellee.
No. 97-03477.

Oct. 28, 1998.

Donald A. Smith, Jr., of Smith & Tozian, P.A., Tampa, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Jean-Jacques Darius and Michael J. Scionti, Assistant Attorneys General, Tampa, for Appellee.

ALTENBERND, Acting Chief Judge.

Mark L. Gibson appeals his judgments and sentences for capital sexual battery and lewd and lascivious acts upon an 8-year-old victim. We affirm. Neither the conduct of law enforcement during pretrial interviews nor the events immediately preceding this trial resulted in preserved, reversible error. Although a sentence of life with no possibility of parole – effectively imprisonment until death – must seem harsh from the perspective of this 23-year-old prisoner with no prior criminal record, he was convicted of a serious offense for which this penalty is neither cruel nor unusual.

I. THE EVIDENCE

Mr. Gibson was the stepfather of the 8-year-old female victim. On Friday, January 17, 1997, the mother and the victim were watching a television show involving a young

child who had been sexually molested. The mother asked her daughter if anything similar had ever occurred to her. Initially, the child put her head down and would not answer. Following a few more questions, she said that her "daddy" had touched her. The child did not provide any detailed description of the events.

The mother placed the child in her car and drove to her husband's place of employment. She confronted him about the allegations. She testified that he admitted that he had "messed" with the child. She did not ask her husband for details of these events, but learned that the last occurrence had been in early January. The mother asked Mr. Gibson to leave the home, but did not immediately report the matter to the police. The mother revealed this incident to her own mother, who reported the matter to the sheriff's department. A deputy sheriff came to the home on Sunday, January 19, 1997, and filed a report. A few days later, a detective interviewed the child and Mr. Gibson. At trial, the deputy did not testify concerning the statements of the victim. He primarily testified regarding his recorded interview of Mr. Gibson, which took place in a police interrogation room. An edited transcript of that interview was read to the jury.

At the beginning of the interview, the officer read Mr. Gibson his *Miranda*[1] rights. After reading these rights, the officer stated: "A lot of legal garbage but it basically comes down to the point that you don't have to talk to me if you don't want to." Mr. Gibson then asked the officer whether the victim was present behind a two-way mirror. Once he

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[1] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

knew the victim was not present, he agreed to talk to the officer. After initially denying any wrongdoing, Mr. Gibson's statement gradually evolved toward admitting misconduct. Near the end of the interview, the detective asked:

> Okay. So, your penis has actually touched her vaginal area? I'm not saying up inside, but it's touched the lips of her vaginal area? Mr. Gibson answered the question: "Yes, sir."

The victim was the first witness to testify at trial. During direct examination, she testified that Mr. Gibson put his hand or fingers into her "private part." She also claimed that he put his private part "halfway" into her private part and that it hurt. Each of these acts occurred on several occasions. In addition, she said he also touched her bottom with his mouth and his private part. She touched his private part with her hands because he told her to do this.

On cross-examination, the victim confirmed that she knew the meanings of the words "vagina" and "penis," and that Mr. Gibson had placed his penis into the opening of her vagina. Her vagina did not bleed. She explained that, on several occasions, "white stuff" had come out of his penis during these events. The fluid came out when his penis was "soft." She further testified that Mr. Gibson licked her vagina.

A nurse, who had examined the victim in late January, testified that her examination of the victim was essentially normal. The child's hymen was intact. Although this physical examination would not be consistent with extensive penetration of the child's vagina by an adult penis, it did not rule out the possibility that Mr. Gibson's penis touched the opening of her vagina. The

nurse, who was an experienced member of a child protective team, testified that girls with little sexual experience sometimes confuse insertion of a penis into the labia with vaginal penetration.

II. AMENDING THE INFORMATION AND CHANGING LAWYERS PRIOR TO TRIAL

The original information in this case charged Mr. Gibson with three counts of capital sexual battery based on penile penetration or union, digital penetration, and oral union. The information included a fourth count of lewd and lascivious conduct based on Mr. Gibson's request to have the child touch his penis. On the Friday before trial in June 1997, the State amended the information to allege two counts of capital sexual battery, dropping the charge of oral union. The amended information included three counts of lewd and lascivious conduct, adding charges based on improper contact with the victim's buttocks and fondling the victim's vagina. It is clear that the State was not adding any new incidents to the information, but was merely attempting to reconfigure the charges arising out of the events as reported in January.

On Monday, immediately preceding trial, Mr. Gibson moved for a continuance. Although he was concerned with the amendment to the information, he was primarily concerned that the public defender had unilaterally assigned his attorney to another division. Mr. Gibson had been assigned a new assistant public defender to defend his capital felony charges only one working day before the trial. The trial court denied the continuance, maintaining that the policy decision of the public defender's office was not the court's concern. After jury selection, Mr. Gibson

was represented by both his original lawyer and the new lawyer.

III. THE VERDICT

At the conclusion of the case, the jury convicted Mr. Gibson of capital sexual battery on the charge of penile penetration or union, and of lewd and lascivious conduct for the touching of his penis and for his touching of the victim's buttocks. The jury acquitted him of the remaining charges. As the jury was leaving the courtroom, the judge began adjudicating Mr. Gibson and then commented: "Am I correct, as to the first count of the information, the penalty is life imprisonment without possibility of parole?" The assistant state attorney confirmed that this was the mandatory sentence.

Mr. Gibson refused to be fingerprinted. As the court was resolving that problem, the jury returned to the courtroom. One of the jurors, not the foreperson, made a passionate speech, explaining that the jury concluded that something bad had happened in the child's home, but that the misconduct was not entirely Mr. Gibson's fault. Near the end of his speech, the juror said:

> We feel the defendant deserves to be punished. I heard you say something about a life sentence. He doesn't deserve a life sentence. I hope it is not a mandatory life sentence. If I would have known that, I don't think I would have voted guilty for it.
>
> If I were King, I would take this child and put it with a different family altogether and hope that she had a great life. This is not to disparage your son or Mrs. Gibson. It's just a very sad situation,

> and we're all very concerned for the welfare of the child.

Then, the juror turned to the other jurors and said: "Does anybody else have anything they may want to add, or did I sum it up pretty well?" The court reporter then placed in the transcript the comment, "Jurors indicating affirmatively."

The trial court imposed the mandatory life sentence at a later hearing, after Mr. Gibson had rejected an unusual post-verdict proposal from the State that he plead guilty to some offense and waive his appellate rights in exchange for a sentence of imprisonment with the possibility of release after 25 years.

IV. THE ISSUES RELATING TO THE CONVICTION

For the first time on appeal, Mr. Gibson argues that his statements to the detective should have been suppressed because he did not make a knowing and voluntary waiver of his *Miranda* rights. *See Moran v. Burbine*, 475 U.S. 412, 422, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *Brookins v. State*, 704 So.2d 576, 577 (Fla. 1st DCA 1997); *State v. Mallory*, 670 So.2d 103, 106-107 (Fla. 1st DCA 1996). He emphasizes both the detective's characterization of the United States Supreme Court decision as "legal garbage," and the officer's failure to point out that the crime as described by the victim would result in a mandatory sentence of life imprisonment without possibility of parole.

The State responds that this issue is not preserved. We agree that Mr. Gibson's attorneys never filed a motion to suppress his statement and affirmatively indicated no

objection to its introduction into evidence. Thus, this issue cannot be reviewed on direct appeal. *See* § 924.051, Fla. Stat. (Supp.1996).

Mr. Gibson also argues that the trial court erred in refusing to grant his motion for continuance, based on the amendment to the information and on the change in his legal representation. Concerning the late amendment to the information, it is not clear from the record that his attorneys perfected an objection to this amendment. The amendment was briefly addressed during a much longer discussion about the problem created by the shuffling of attorneys in the public defenders' office. In light of the failure of the lawyers to suggest how this amendment changed their defense strategy in any fashion, and given that the amendment did not add a new factual basis for these charges and actually downgraded one of the charges, we conclude that the trial court did not commit reversible error by denying the continuance. *See State v. Conte*, 516 So.2d 1115 (Fla. 2d DCA 1987) (defendant did not show prejudice from State's delay in adding conspiracy count to information charging trafficking in cocaine); *cf. Turner v. State*, 376 So.2d 429 (Fla. 1st DCA 1979) (amendment of information, which changed charge from misdemeanor to felony offense, was change of substance and prejudiced defendant's right to fair trial); *Lawson v. State*, 251 So.2d 683 (Fla. 3d DCA 1971) (reversing conviction because information substantially amended after trial proceedings commenced).

Mr. Gibson tries to equate the repositioning of attorneys in the public defender's office to a circumstance in which there is a substitution of counsel immediately preceding trial. *See Holley v. State*, 484 So.2d 634 (Fla. 1st DCA 1986). Such a change in assistant public defenders is

not the same as a substitution of counsel. The public defender's office is comparable, in some respects, to a law firm. The trial court had appointed that office, not a specific assistant public defender, to represent Mr. Gibson. His lawyers' decision to reassign his case to another attorney, especially when that decision was made on the Friday before his trial for a capital felony, may raise an issue of ineffective assistance of counsel, but it did not compel the trial judge, who was uninvolved in the reassignment, to grant a continuance. *See Cox v. State*, 354 So.2d 957 (Fla. 3d DCA 1978) (change of assistant public defenders one day prior to trial did not compel continuance); *see also United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (last-minute substitution of trial counsel does not automatically render assistance ineffective). Our record does not provide a basis to reverse on this issue.

V. LIFE IMPRISONMENT IS NOT CRUEL OR UNUSUAL IN THIS CASE

The narrow constitutional issue presented by this case is whether the legislature has the power to impose a mandatory sentence of life without possibility of parole for the crime of penile union with the vagina of a girl less than 12 years of age when a defendant has no prior criminal record. This opinion does not address the constitutionality of this mandatory sentence for other conduct that is defined as capital sexual battery. Although the issue is close and this extreme penalty may cause some intrafamilial crimes to go unreported, we conclude that the penalty is not cruel or unusual.

A. *The Evolution of the Current Capital Sexual Battery Statute.*

The evolution of the current crime of capital sexual battery and its mandatory penalty warrants brief examination. Through the 1960s, capital sexual battery was punishable by death. During that period, capital sexual battery required proof that a defendant "carnally know and abuse a female child." *See* § 794.01, Fla. Stat. (1969). That statute, based on the common law, required proof of penetration. *See Askew v. State*, 118 So.2d 219, 221 (Fla.1960). Under that statute, Mr. Gibson could have been convicted of a lesser offense, but probably would not have been convicted of capital sexual battery.

Florida's rape statute was amended in 1974. *See* ch. 74-121, Laws of Fla. The amendment changed the definition of sexual battery to "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." § 794.011(f), Fla. Stat. (Supp.1974). This is the same definition of sexual battery that is used in the current statute. *See* § 794.011(1)(h), Fla. Stat. (1997). This anatomically correct, but more antiseptic, definition of capital sexual battery transformed acts that were previously lesser offenses into capital sexual battery. This amendment also results in the more frequent prosecution of capital sexual battery cases in which there is little, if any, physical evidence of rape. Often a defendant is convicted of this crime based primarily, if not exclusively, on the testimony of a young child.

In 1972, the United States Supreme Court held that the death penalty constituted cruel and unusual punishment and struck down existing state death penalty statutes. *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726,

33 L.Ed.2d 346 (1972). The death penalty was reinstated by the Florida Legislature in a different form in 1973. *See* § 921.141, Fla. Stat. (1973). *Compare* § 921.141, Fla. Stat. (1971). In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court addressed the issue of the constitutionality of the death penalty for the rape of an adult woman. The Court held that the death penalty was grossly disproportionate to the severity of the crime and thus unconstitutional. The Court did not, however, address the constitutionality of the death penalty for those convicted of rape of a child.

In *Buford v. State*, 403 So.2d 943 (Fla.1981), the Florida Supreme Court held that the sentence of death is grossly disproportionate and excessive punishment for sexual battery of a child.[2] Thus, we know that the only penalty in the Florida Criminal Code that is more extreme than that imposed upon Mr. Gibson would be unconstitutional if applied in this case.

After the 1974 statutory amendment and the *Buford* decision, the maximum penalty for capital sexual battery was life imprisonment *with* the possibility of parole after 25 years. *See* § 775.082(1), Fla. Stat. (1981). It is well established that life imprisonment with possibility of parole is a constitutional penalty for capital sexual battery, as defined in section 794.011(1)(h). The Florida Supreme Court so held in 1976. *See Banks v. State*, 342 So.2d 469 (Fla.1976); *see also Harrison v. State*, 360 So.2d

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[2] Despite the holding in *Buford v. State*, 403 So.2d 943 (Fla.1981), the Florida Legislature never changed the wording of the sexual battery statute. Thus, upon reading the statute today it would appear that the death penalty could be imposed for those convicted of capital sexual battery. *See* § 794.011(2)(a), Fla. Stat. (1997).

421 (Fla.1978); *Kendry v. State*, 517 So.2d 78 (Fla. 1st DCA 1987).

Mr. Gibson argues that *Banks* and its progeny are no longer controlling because the legislature eliminated the possibility of parole for capital sexual battery convictions in 1995. *See* ch. 95-295, Laws of Fla.[3] Effective October 1, 1995, the legislature amended section 775.082(1), Florida Statutes (1995), so that all capital felonies not resulting in the death penalty are subject to a mandatory sentence of life without possibility of parole. Thus, all capital felonies are now punishable either by death by execution or by imprisonment until death.[4] The jury in this case demonstrates that not all members of the public are aware of this change in the law.

B. *Cruel or Unusual Analysis.*

We have the power to declare this mandatory life sentence "cruel or unusual" under Article I, Section 17 of the Florida Constitution or "cruel and unusual" under the Eighth and Fourteenth Amendments of the United States Constitution. *See Hale v. State*, 630 So.2d 521 (Fla.1993);

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[3] Parole was also eliminated for certain homicides in 1995. *See* ch. 94-228, Laws of Fla.

[4] These new life sentences without possibility of parole are sometimes referred to as "death by imprisonment." Although there is rhetorical balance between "death by execution" and "death by imprisonment," this description overlooks an important distinction between the two penalties for purposes of an analysis of their constitutionality under the Cruel and Unusual Punishments Clause. Execution is death imposed and carried out by the state; death is the punishment in such cases. A sentence of life imprisonment merely ends when death naturally occurs. Thus, death is not a portion of the punishment when the sentence is life without possibility of parole.

Williams v. State, 630 So.2d 534 (Fla.1993). We are required to base this decision upon a proportionality review. *See Hale*, 630 So.2d at 525. The methodology for such a review is not yet explained in any detail in the controlling case law. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *Hale*, 630 So.2d at 525. In *Harmelin*, Justice Kennedy explained:

> Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types. Our most recent pronouncement on the subject in *Solem*, furthermore, appeared to apply a different analysis than in *Rummel* [*v. Estelle*, 445 U.S. 263, 274, 100 S.Ct. 1133, 1139, 63 L.Ed.2d 382] and [*Hutto v.*] *Davis*[, 454 U.S. 370, 373-374, 102 S.Ct. 703, 705-706, 70 L.Ed.2d 556]. *Solem* twice stated, however, that its decision was consistent with *Rummel* and thus did not overrule it. *Solem*, supra, 463 U.S., at 288, n. 13, 303, n. 32, 103 S.Ct., at 3008, n. 13, 3017, n.32.

501 U.S. at 998, 111 S.Ct. 2680.

Even though the precise contours of the proportionality analysis are unclear, the United States Supreme Court has specifically stated that a proportionality analysis should be guided by objective criteria, including: (i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292, 103 S.Ct. 3001. Justice Kennedy suggests that precedent establishes several common Eighth Amendment principles that effectively require the courts

to give broad deference to the substantive penological policies announced by the state legislature without undue comparison to the policy decisions of other states.[5] *See Harmelin*, 501 U.S. at 998-99, 111 S.Ct. 2680.

Considering first the gravity of the offense of capital sexual battery and the harshness of the penalty of life imprisonment without the possibility of parole, we do not question the legislature's wisdom in deciding that this crime is a very grave offense warranting severe punishment. Child sexual predation is a serious concern. *See* § 775.21, Fla. Stat. (1997). Even when it leaves no physical scars, it can create emotional damage that lasts a lifetime. There is evidence that victims of abuse become abusers and that this crime can transmit its injuries across generations. *See* Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use Of Norplant As A Condition Of Probation*, 78 Iowa L.Rev. 779, 794 (March 1993); Charles A. Phipps, *Children, Adults, Sex And The Criminal Law: In Search Of Reason*, 22 Seton Hall Legis. J. 1, 107 (1997). Because victims hesitate to report this crime and proof of the offense is often difficult to obtain, there is a risk that perpetrators will believe they can escape detection and punishment. As a result, there is a need for a harsh penalty to act as a sufficient deterrent. It is useful to recall that a sentence of life imprisonment with the possibility of parole after 25 years came with no promise of parole. For many prisoners, the sentence imposed for

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[5] In *Harmelin*, 501 U.S. 957, 966-75, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), Justice Scalia, writing for himself and Justice Rehnquist, argues that from a historical analysis, the proper question for a cruel and unusual analysis should be whether the sentence is illegal, not whether is it proportionate. From this perspective, there is no question that the sentence in this case is not cruel and unusual.

capital sexual battery prior to October 1995 may result in a sentence just as long as a sentence imposed after 1995. Thus, weighing this criteria alone, we cannot conclude that life imprisonment without possibility of parole is a disproportionate penalty for this variety of sexual battery.

Second, we consider the sentences imposed on other criminals in this jurisdiction. There is little question that Florida has a history of imposing lengthy prison sentences for many offenses. Except for the brief period following the decision in *Furman*, this state has always utilized the death penalty. It is difficult to compare the type of sexual offense that occurred in this case to crimes such as murder or robbery. Murder takes a person's life with no chance that it can be returned; capital sexual battery inflicts lasting emotional scarring and takes a child's innocence with no chance that it can be returned. Robbery steals a person's property and risks personal safety; capital sexual battery steals a person's sense of self with an equal risk to personal safety. The legislative choice to imprison these offenders until death may involve a considerable commitment of state resources, but it is not disproportionate to the punishment we provide to other criminals who violate cherished personal rights, as compared to property rights.

Third, we consider the sentences imposed for commission of the same crime in other jurisdictions. The parties have provided us with little information to use in this analysis. We have chosen to look at the statutes in our neighboring states of Mississippi, Alabama, and Georgia. Although Florida appears to impose the most severe punishment for a sexual battery without penetration, all states provide extensive penalties. In Mississippi, sexual battery is defined similarly to capital sexual battery in Florida. *See* Miss.Code Ann. § 97-3-95(1)(d) (1997). A

person who is convicted of sexual battery in Mississippi and is 18 years of age or older shall be imprisoned for life or such lesser term of imprisonment as the court may determine, but not less than 20 years. *See* Miss.Code § 97-3-101(3) (1997). Alabama's legislature defines rape in the first degree similarly to the Florida Legislature's definition of sexual battery. *See* Ala.Code 13A-6-61(a)(3) (1997). Those convicted of rape in the first degree in Alabama can be punished by imprisonment for life or not more than 99 years or less than 10 years. *See* Ala.Code 13A-5-6(a)(1) (1997). Finally, Georgia's statute is hard to equate to Florida's statute because Georgia still relies on the common law concept of "carnal knowledge" to define rape. However, a person convicted of the offense of rape in Georgia may be punished by death, by imprisonment for life, or by imprisonment for not less than 10 or more than 20 years.[6] *See* Ga.Code Ann. § 16-6-1(b).

We have no data that would allow us to know whether any state except Florida consistently or mandatorily imposes a sentence of life imprisonment without possibility of parole for sexual battery without penetration. Nevertheless, our brief examination of neighboring states does not suggest that Florida's penalty is so out of line as to render our legislature's selected punishment unconstitutional.

Applying these objective criteria, we conclude that life imprisonment is a proportionate punishment for the offense of sexual battery and does not constitute cruel or

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[6] At least for adult female victims, this statute is unconstitutional. *See Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

unusual punishment. There is reason to be concerned that family members who know about the severity of this penalty will hesitate or even refuse to report intrafamily sexual battery, or choose not to cooperate with its prosecution. The eloquent juror in this case demonstrates that jurors who understand the law may choose to exercise their options of jury pardon in some cases. Thus, there is a possibility this inflexible mandatory penalty of life imprisonment may result in fewer convictions for this type of sexual predation than a more flexible penalty. As a result, this more severe punishment may ultimately prove to be a lesser deterrent than a more flexible penalty. These concerns, however, are matters for consideration by the legislature and do not affect this court's constitutional analysis.

Affirmed.

APPENDIX F

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

vs.

MARK LEE GIBSON /

Case No. 97-1202

Division "C"

This cause came on to be heard before the Honorable Diana M. Allen, Circuit judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on June 9, 1997, as follows:

* * *

[3] PROCEEDINGS

MR. OSSI: Page 3, Mark Gibson.

MR. SINACORE: Good morning, Judge.

MR. LITTMAN: Good morning. Assistant Public Defender Ken Littman for the defendant. Judge, this case was set for trial today; however, we are seeking for continuance. I was appointed to the case on Friday and I never met Mr. Gibson before this morning. In addition, the State has filed the superseding Information which would substantially change some of the counts of the original Information.

THE COURT: Let me see it. I asked for it Friday and it wasn't filed.

MR. SINACORE: What we did, Judge, we deleted one capital count and added two L & L's based on the Information.

THE COURT: Same victim, same time frame. So what's new? Is this filed?

THE CLERK: Yes, ma'am.

THE COURT: To the superseding Information, how does your client plead?

MR. LITTMAN: Not guilty, Your Honor.

THE COURT: Now why is it that you just got on this case on Friday?

[4] MR. LITTMAN: Because I was assigned to take over Ms. Cuellar's position in S.O.D., Your Honor.

THE COURT: Where is she?

MR. LITTMAN: She has my old position of L.T.A. of Division F.

THE COURT: So she's not ready to try this case?

MR. LITTMAN: No, she's not, Your Honor.

THE COURT: Why not?

MR. LITTMAN: As I said, because she's assuming her new duties before Judge Tharpe.

THE COURT: Well, I don't care a thing about her new duties. Other than the Public Defender's arbitrary reassignment of this case, why isn't it ready for trial?

MR. LITTMAN: As I said, Judge, I just took the case over Friday. I never met Mr. Gibson until he walked into the court.

THE COURT: Other than the Public Defender's arbitrary reassignment of this case, why is if not ready for trial?

MR. LITTMAN: Judge, I cannot answer your question.

THE COURT: Well, stand by. Stand by to [5] pick a jury.

* * *

APPENDIX G

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

vs.

MARK LEE GIBSON /

Case No. 97-1202

Division "C"

This cause came on to be heard before the Honorable Diana M. Allen, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on June 10, 1997, as follows:

* * *

[62] Q. Well, your mom was the first person that ever spoke to you about this case and that would have been at the nail place? Am I right?

A. Yes, sir.

Q. Chelsea, am I correct, there was a time before you were in the nail place when you told your mom what you say Big Mark had done to you?

A. No, sir.

Q. You never told her that?

A. No, sir.

Q. Well, was there a time before you were in the nail place – now listen carefully – when you told your mom that Big Mark, you say, had done something and your mom didn't believe you?

A. Oh, I just remembered. This was a long time ago. I guess I was four or five and he done that to me and I told my mother, but she didn't believe me because I was so young.

Q. Are you sure you weren't a little older, six or seven, when that happened?

A. I guess, probably six or seven. Five or four; I'm not for sure.

Q. How old are you now Chelsea?

[63] A. Eight.

Q. When will you be nine?

A. September the 20th.

Q. Of this year?

A. Yes, sir.

Q. Now, can we go back to the nail place, the nail salon your mom was having her nails done; is that correct?

A. That's correct.

Q. There was a TV show playing?

A. Yes.

Q. Do you happen to know what show it was?

A. It's like one of those shows like Oprah, but I can't remember what it was called.

Q. This was during the day; am I correct?

A. Yes, sir.

Q. I think you told Mr. Sinacore the show had something to do about a little girl, was it, who said she had been abused by her grandfather?

A. Yes, sir.

Q. Now, at that point, did you go over to your mom and say, you know, Big Mark did the same thing to me?

A. No. She asked me the question, "Chelsea, if anyone has ever done that to you, you need to tell me." And she asked me did so and so do that to you, and I go, [64] "No." And she said, did so and so do this to you? And I go, "Now?" And then she finally said, "Did your daddy do that to you?" And I said, "Yes, ma'am," and then I'm like all nervous telling her.

Q. So your mom was the one who asked you if this had happened?

A. Yes, sir.

Q. You didn't go over and tell her?

A. No, sir.

Q. And if I understood what you just said, first your mom asked you the names of several other people –

A. Yes, sir.

Q. – if they had done something?

A. Yes, sir.

Q. Were those other men?

A. Yes, sir.

Q. Were they relatives of yours?

A. Yes, sir.

Q. And you said no?

A. Yes, sir.

Q. The only one that you told your mom you say had touched you this way was Big Mark?

A. Yes, sir.

Q. Just so we're clear, also, Big Mark is not your real dad?

[65] A. No, sir.

Q. He's your stepdaddy; is that correct?

A. No, sir – yes, sir, correct.

Q. How long have you known Big Mark?

A. Since I was a baby-baby.

Q. So, really, all your life?

A. Almost my whole life.

Q. When you were living with your mom and Big Mark, you saw them together many times, right?

A. Yes, sir.

Q. Was it true, Chelsea, that your mom and Big Mark fight a great deal?

A. Fighted?

Q. Had a lot of arguments.

A. Yes, sir.

Q. Very angry arguments?

A. Yes, sir.

Q. And those arguments were before you spoke to your mom in the nail shop; is that correct?

A. Yes, sir.

Q. There were a lot of those arguments?

A. Yes, sir.

Q. Now, Chelsea, I want to ask you about some of the things you told Mr. Sinacore that you say Big Mark did to you. I don't want to embarrass you in any way, [66] okay, but I need to ask you these questions.

A. All right.

Q. Again, if what I say is not clear or I use a word that you don't use, just let me know.

A. Okay.

Q. Okay. Now, the things that you told us about where he touched you, where did these things occur?

A. What's that mean?

Q. At what location? At what place?

A. Probably when we lived in Lakeland. When we lived in DeLand.

Q. Lakeland and in DeLand?

A. And Plant City.

Q. Now, you had never told anybody about what you say happened, true?

A. Yes, sir.

Q. Not your teachers?

A. No, sir.

Q. Do you go to church?

A. Once in a while, we go with my mom's sister.

Q. Did you ever tell your reverend or your minister?

A. No, sir.

Q. Did you ever tell a member of your family?

A. No, sir, only my mom.

[67] Q. Now, the things that Mr. Sinacore asked you about, did you say that Mark had you on a bed? Did I hear you say that?

A. Yes, sir.

Q. And you're sure it was a bed?

A. Yes, sir.

Q. Did you ever tell anybody it happened on a toilet?

A. Yes, sir.

Q. Well, tell us what you said happened on the bed.

A. Well, we sat on the bed and he took off my clothes and he took off his, too, and he stuck his private part in mine.

Q. Again, I don't want to embarrass you. When you say your "private part," do you mean your vagina?

A. Yes, sir.

Q. You know that's the proper name for that part of your body?

A. Yes.

Q. And his private part, you know that's called a "penis"?

A. Yes, sir.

Q. Did he actually put it inside your vagina, into the opening?

[68] A. Yes, sir.

Q. Did it hurt you?

A. Sometimes.

Q. When you say sometimes, was there more than one time that he did this?

A. More than one time.

Q. Were you ever bleeding when this happened?

A. No, sir.

Q. No blood came out?

A. No, sir.

Q. Did anything ever come out of his penis that you know?

A. Yes, sir, some white stuff.

Q. How many times did that white stuff come out?

A. A few times.

Q. More than one time?

A. Yes, sir.

Q. And what did his penis look like when that happened? Was it hard, if you know? Was it soft?

A. Soft.

Q. And you were never bleeding?

A. No, sir.

Q. Was there ever anyone else in the house, Chelsea, when you say that happened on the bed?

A. Well, my mom would always be gone. My [69] brother was home, but Mark would always send my brother to his room or the living room.

Q. Now, you had your clothes off when you were on the bed when you say this is happening?

A. Yes, sir.

Q. How about Big Mark, was he undressed, too?

A. Yes, sir. Yes, sir.

Q. And did he say anything to you when you said these things happened?

A. He said never to tell anyone.

Q. And you didn't tell anybody?

A. No, sir.

Q. Did he do anything else to you on the bed that you can think of?

A. No, sir.

Q. Okay. Did he do anything else to you; by that I mean, touch you in any way at someplace other than the bed?

A. Well, he – he licked my vagina.

Q. With his mouth?

A. Yes, sir.

Q. With his tongue, you mean?

A. Yes, sir.

Q. Where did he do that?

A. I can't remember.

[70] Q. Do you know if that was in Plant City?

A. I think so.

Q. You think so?

A. Yes, sir.

Q. You're not sure?

A. I'm not sure.

Q. Okay, fair enough. That could have been in Lakeland or in Deland?

A. Yes, sir.

* * *

APPENDIX H

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

vs.

MARK LEE GIBSON

Case No. 97-1202

Division "C"

_____/

This cause came on to be heard before the Honorable Diana M. Allen, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on June 11, 1997, as follows:

* * *

[294] THE COURT: We're adjourned.

MR. CLARKE: Has sentencing been completed?

THE COURT: No.

MR. CLARKE: I think I speak for everyone.

THE COURT: Just for the record, all members of the jury are present and we are not in session, but I am having the court reporter record this.

MR. CLARKE: We feel something happened. It was a very difficult case to try. It was a lot of jumbled testimony. It was tough to – it was tough to differentiate one person's testimony from another, or any one person's testimony. We do feel some inappropriate behavior occurred.

We also feel that there was possible manipulation on the mother's part; however, that doesn't mean that we don't think that something didn't happen. The whole – I'm going to put this succinctly, but I want to make sure you know our point. I'll just be graphic about it.

[295] An 8-year-old child should not be taking showers with adults. The mother knew what was going on and allowed it to occur. A child should not be bringing toilet paper to an adult on the toilet The mother knew this was going on and allowed it to occur. Yeah, they started talking about maybe she's getting too old for this to happen, but it should have come way before eight years old. It should have come at five, four.

We feel that the mother is not necessarily to blame for a lot of – for this to happen. How do I put this? She's not a great role model and I hope you'll take that into account in sentencing.

We feel that the defendant deserves to be punished. I heard you say something about a life sentence. He doesn't deserve a life sentence. I hope it's not a mandatory life sentence. If I would have known that, I don't think I would have voted guilty for it.

If I were king, I would take this child and put it with a different family altogether and hope that she had a great life. This is not to disparage your son or Mrs. Gibson. It's just [296] a very sad situation, and we're all very concerned for the welfare of the child.

No. 1, I don't know if there's anything you can do about that or not.

And, No. 2, for the punishment of the defendant, we feel he needs some punishment. We don't think it should be

drastic or severe. If there's any way you can order counseling and anger counseling for him, we would recommend that. And if there's anything you can do in regards to psychological counseling for the mother, we would highly recommend that, as well. And, of course, the child is going to need some help.

Does anybody else have anything they may want to add, or did I sum it up pretty well?

[Jurors indicating affirmatively.]

THE COURT: Well, thank you, gentlemen. I'm going to have the court reporter type that up and provide it to counsel for both parties, the State and the defendant, and we'll consider those comments. You did hear me correctly, however; the punishment for sexual battery as charged in this case is life imprisonment.

**MR. CLARKE: Mandatory life sentence [297] without possibility –*

THE COURT: Without possibility of parole.

MR. CLARKE: That's an unfair sentence in this case, if you don't mind my saying so. That's a very unfair sentence in this case.

THE COURT: Thank you. We'll take those matters into consideration as far as we can.

MR. CLARKE: Do I speak for all of us when I say that?

[Jurors indicating affirmatively.]

THE COURT: Each of the jurors is acknowledging that's correct, he speaks for all of them. I know it's a

difficult case for you and I thank you for your service. Thank you.